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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TRAVIS WARD
Petitioner

v.

SENTRY TITLE CO., INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Fifth Circuit in the above mentioned case, entered January 7, 1987.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit Court of Appeals decision violates the *Erie* doctrine since it fails to apply the controlling substantive state law on the issue of resulting trust?
2. Whether the panel decision violated fundamental principles of due process when it reversed the District Court's favorable resulting trust ruling based on an erroneous conclusion that the resulting trust claim had been adjudicated by a prior panel?
3. Whether the panel's holding that it cannot disregard the precedent of a prior panel even if it perceives the prior decision to be in error in applying state law violates fundamental constitutional principles of due process?
4. Whether the panel's refusal to review the erroneous precedent of the prior panel regarding a determination controlling state substantive law of resulting trusts violates fundamental constitutional principles of equal protection?

5. Whether the panel's decision violated the Rules of Decisions Act when it erred in not applying the controlling state substantive law on resulting trust?

6. Whether the manifest injustice and prejudice to innumerable future litigants on state issues in the Fifth Circuit, resulting from the Court of Appeals decision warrants exercise of the Supreme Court's broad supervisory authority?

7. Whether, at a minimum, the circumstances of this case warrant certification of the resulting trust issue to the Texas Supreme Court?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner Travis Ward and the Respondent Sentry Title Co., Inc., as well as Home Engineering, Inc. and Alan Whatley. Home Engineering, Inc. and Alan Whatley are not named as respondents herein because they are not affected by the issues presented in this petition.

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OPINIONS BELOW

The most recent opinion of the United States Court of Appeals for the Fifth Circuit is reported at 806 F.2d 1278 (5th Cir. 1987) ("*Sentry III*"). The Court's two prior opinions, which are relevant to the Court's consideration of this petition, are reported at 727 F.2d 1368 (5th Cir. 1984) ("*Sentry II*") and 715 F.2d 941 (5th Cir. 1983) ("*Sentry I*"). All three opinions are reprinted in the appendix hereto at D, E, and F.

The Judgment of the United States District Court for the Northern District of Texas (Hill, D.J., now a Judge of the Court of Appeals of Fifth Circuit), has not been printed. It is reprinted, together with the district court's Findings of Fact and Conclusions of Law on Petitioner Ward's Resulting Trust Claim in the appendix hereto, at I and J.

JURISDICTION

Federal jurisdiction was invoked under 28 U.S.C. Sections 1340, 1345 (1980) when the Internal Revenue Service of the United States of America removed this case to the United States District Court for the Northern District of Texas from the District Court of Dallas County, Texas, on June 2, 1975. Judgment was entered for Petitioner on January 29, 1982.

On Respondent's appeal, the Fifth Circuit entered its opinion on September 26, 1983, reversing the District Court's judgment, and remanding the case for further proceedings. Petitioner's Motion for Panel Rehearing and Suggestion for Rehearing En Banc were denied. On March 12, 1984, the Court entered its second

opinion, *Sentry II*, to consider cross motions to recall the Court's mandate. The Court recalled its prior mandate, but modified its prior opinion only slightly, and reversed and remanded the case for further proceedings. Upon remand, judgment was again entered for Petitioner, on November 11, 1985. That decision was again repealed by Respondent, and on January 7, 1987, the Fifth Circuit entered its opinion again reversing the District Court's judgment. Petitioner's Motion for Panel Rehearing and Suggestion for En Banc Rehearing were summarily denied on February 5, 1987. Petitioner's Motion to Stay Mandate was granted on February 23, 1987.

The jurisdiction of this court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Section 1254 (1) (1966).

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED AND RULES OF THE FIFTH CIRCUIT COURT OF APPEALS

United States Constitution, 5th Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service or time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, 14th Amendment, Section One:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules of Decision Act, 28 U.S.C. Section 1652 (1976)
Section 1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 26, 1948, c. 646, 62 State. 944.

Rule 35, Federal Rules of Appellate Procedure, 28 U.S.C.
Determination of Causes by the Court En Banc.

(a) When Hearing or Rehearing En Banc Will Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involved a question of exceptional importance.

(As amended April 1, 1979, eff. Aug. 1, 1979.)

Internal Operating Procedure, Court of Appeals for the Fifth Circuit. Suggestion for Rehearing En Banc.

Extraordinary Nature of Suggestions for Rehearing En Banc—A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent. **Alleged errors in the determination of state law,** or in the facts of the case, **are matters for panel rehearing but not for rehearing en banc.** (emphasis supplied)

Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.

Rule 52. Findings by the Court

(a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for pur-

poses of review. **Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.** The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b) (emphasis supplied).

Rule 114. Texas Rules of Appellate Procedures
Certification of Questions of Law by United States Courts.

(a) Certification of Questions of Law. The Supreme Court of Texas may answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States when requested by the certifying court, if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

STATEMENT OF THE CASE

The interpleader action in *Harris v. Sentry Title Co., Inc. ("Sentry I")*[1] was originally filed in the Texas state district court. The case was removed to federal court pursuant to 28 U.S.C. Sections 1340 and 1345, when the IRS asserted a claim against the interpleader fund.

Petitioner filed a Motion to Remand[2] and Brief in Support[3] thereof, to remand the case to State Court subsequent to satisfaction of the IRS claim and dismissal of the IRS as a party. Nevertheless, the District Court found it would be in the interest of justice to allow the case to remain in federal court rather than delay the litigation further by remanding it to state court.[4]

[1] *Sentry I*, 715 F.2d 941 (5th Cir. 1983).

[2] See Appendix G.

[3] See Appendix H.

[4] *Sentry I*, 715 F.2d at 943, 945.

Upon applying Texas Supreme Court precedent regarding the law of constructive trusts to the undisputed facts in this case, the District Court imposed a constructive trust on the proceeds of the sale of the Dyckman property, or the property or transaction over which this dispute arose. The District Court ruling imposing a constructive trust is based on the fact that the Dyckman property was acquired by Respondent on behalf of Petitioner pursuant to an oral agreement, a fiduciary relationship existed between the parties regarding the acquisition, and the fiduciary relationship encompassed or was thus directly related[5] to the Dyckman property.

As pertinent to this case, upon ruling favorably on Petitioner's constructive trust claim the District Court did not find it necessary to rule upon Petitioner's resulting trust claim.

Upon appeal to the Court of Appeals for the Fifth Circuit, the Court of Appeals in an unprecedented interpretation of Texas state law found that the "critical"[6] **issue** in the case involved the **sufficiency of the prior fiduciary relationship** for purposes of supporting imposition **of a constructive trust**. While specifically accepting the **District Court** findings that a prior **fiduciary relationship** existed between the parties encompassing or thus **directly related** to the acquisition of the Dyckman property, the Court of Appeals **held** that Texas law requires that a constructive trust **must be** supported by a **prior fiduciary relationship** which is separate, independent and **unrelated**[7] to the subject transaction.[8] We respectfully submit that this conflicts with all prior Texas law, a holding from which, up to now, we have been wholly unable to obtain judicial relief.

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[5]See Appendix L, Accord, *Rankin v. Naftalis*, 557 S.W.2d 949 (Tex.) 1976), *Huffington v. Upchurch*, 532 S.W.2d 576 (Tex. 1976); *Palmer v. Fuqua*, 641 F.2d 1146, 1155-1157, 1160 (5th Cir. 1981) (applying Texas law). A constructive trust imposed for breaches of fiduciary relationships is of course an exception to the Statute of Frauds.

[6]*Sentry II*, 727 F.2d 1368, 1370 (5th Cir. 1984).

[7]*Sentry I*, 715 F.2d at 948.

[8] For a graphic illustration of the undisputable fact that the controlling Texas Supreme Court precedent recognizes that where a fiduciary relationship which is breached encompasses or is directly related to the transaction at issue, it is sufficient to support a constructive trust, please refer to Appendix L.

While the Fifth Circuit in the first appeal referred to the elements of a resulting trust,[9] the Court stated that the "...general rule known as 'resulting trust' is not raised in this case." *Sentry I*, 715 F.2d at 949, n. 4. We earnestly urge that if "resulting trust" was not raised, then it was not before the Fifth Circuit for decision. It remained an open, undecided issue, awaiting the further action of the District Court.

Upon remand, the District Court, consistent with the panel's finding that the resulting trust claim was not involved in the appeal, and consistent with the District Court's prior ruling wherein it was not necessary to rule on the resulting trust claim since it had imposed a constructive trust, concluded that imposition of a resulting trust was appropriate under Texas law.[10]

Importantly, subsequent to the District Court decision, in prejudice to Petitioner's right for appellate review, a new panel of the Fifth Circuit held that it could not review the resulting trust claim (1) because the prior panel had adjudicated the claim and (2) because of "...our firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent."[11]

Petitions for Panel Rehearing and Rehearing en banc were filed and summarily denied.

As discussed below, Petitioner respectfully submits that the Court of Appeals decision is hopelessly irreconcilable with Texas state law and with our judicial system's paramount respect for

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[9]*Sentry I*, 715 F.2d at 946. Petitioner submits that this discussion constitutes *obiter dictum* and is not binding on any court. *Pasterchik v. United States*, 466 F.2d 1367, 1368 (9th Cir. 1972); *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041, 1046 (E.D.N.C. 1979) *See also McDaniel v. Sanchez* 425 U.S. 130, 141 (1981). Claims and issues discussed in comments which constitute *obiter dictum* are not "adjudicated" and remain open for decision. *In re Irving*, 600 F.2d 1027, 1034 (2d Cir. 1979).

Furthermore, as demonstrated by Appendix M the panel's dictum plainly constitutes an erroneous interpretation of the Texas courts law on resulting trust. For example, of all the Texas decisions enunciating the elements of a resulting trust, none of the decisions support the panel's comments regarding resulting trusts.

[10]See Appendix J.

[11]*Sentry III*, 806 F.2d at 1282. In concluding that the resulting trust issue had already been decided the new panel stated that it could "see no grounds or 'manifest injustice' requiring a reexamination of the Court's prior opinion." *Id.*

due process and equal protection of the laws.

Moreover, consistent with the spirit of *Erie* and the policy concerns of our federal judicial system of providing an equitable administration of the laws and avoiding decisions which promote forum shopping, this Court is compelled as the last avenue of relief to review and correct the actions of the Court below.

The concepts of due process, equal protection of the laws, and appropriate application of state laws by our federal judicial systems, are among the most critical rights of the individual inherent in a fair administration of the laws by our federal system of government.

Plainly, when these most basic concepts protecting the rights of the individual and state law litigants in the federal system are threatened, the attention of this Court is warranted.[12]

REASONS FOR GRANTING THE WRIT

1. The Decision of the Fifth Circuit Violates *Erie* and its Underlying Policies

This case presents the Court with judicial and constitutional questions of exceptional public importance.

As will be shown below, the Circuit Court's ruling is in clear contravention of the federal judicial policy well-established in *Erie*[13] since it is hopelessly irreconcilable with controlling Texas law as declared by its highest Court. Moreover, the decision undermines the dual aims of *Erie*: the avoidance of inequitable administration of the laws and the discouragement of forum shopping.

While the present case is not a diversity case, the law is well-settled that the principles of *Erie* are equally applicable to diver-

[12]Importantly, the procedural history of this case is similar in respect to *Wichita Co. v. City Bank*, 306 U.S. 103 (1938), a case, likewise, involving important questions regarding the law of fiduciary relations for commercial transactions in Texas. Significantly, even though as here, the Court of Appeals had denied two rehearings, the Supreme Court granted certiorari on the basis of *Erie*. Moreover, in light of the significant constitutional questions raised herein, Petitioner respectfully submits there is even more reason for granting the writ in this matter.

[13]*Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938).

sity and non-diversity cases. *Bernhardt v. Polygraphic Company,* 350 U.S. 198, 200 (1956); *Wichita Royalty Company v. City National Bank, supra* at 107; *First Southern Federal Savings v. First Southern Savings,* 614 F.2d 71, 73 (5th Cir. 1980).

The effect of the lower Court decision, contrary to *Erie*, is to eliminate state created rights.

At the outset, there can be no doubt that the manner in which the **Fifth Circuit** has addressed Petitioner's state law claim of resulting trust **has resulted** in a patently obvious inequitable administration of **federal law form over state law substance**.

The Fifth Circuit in *Sentry I* specifically found that it was not presented with the "resulting trust" issue and that its "decision finds the 'constructive trust' exception inapplicable."[14]

In ignoring the merits of the District Court's ruling that the findings of fact warranted the imposition of a resulting trust under Texas state law, and indeed the District Judge's inherent understanding that the resulting trust claim had never been adjudicated,[15] the panel decision, relying on *obiter dictum*, found that the prior panel decision had adjudicated the resulting trust claim. Importantly, consistent with its failure to review the merits of the District Court's ruling on the resulting trust issue, the panel decision also found that it could not disturb the alleged resulting trust ruling of the prior panel even if it perceived the prior decision to be in error.

Such an administration of the law in federal court plainly **results in no application of controlling substantive state law** on the basis of resulting trust.

Under either possible scenario the Court has simply refused to conduct appellate review and application of substantive state

[14]*Sentry I*, 715 F.2d at 949, note 4.

[15]Who would better understand the fact that the resulting trust claim had never been adjudicated than the District Court that had not found it previously necessary to rule on the issue? For a graphic illustration of the fact that the resulting trust claim was not previously adjudicated until the District Court ruled favorably on Petitioner's resulting trust upon remand from *Sentry I* and *Sentry II*, see Appendix K, which also graphically demonstrates that a due process and equal protection gap are brought about by the I.O.P. provisions holding that the en banc court does not review state law issues, and *Sentry III*'s conclusion that it is impossible to not follow a prior panel on a state law issue even if it considers a prior panel adjudication to be erroneous on the state law issue.

law: (1) the panel erred in refusing to review the merits of the District Court application of state law since it erred in concluding that the resulting trust issue had been previously adjudicated, and in any event (2) even assuming arguendo that the resulting trust claim had been adjudicated by the prior panel, the panel erred in finding that it could not rule differently on the state law claim if it perceived the resulting trust ruling by the prior panel to be contrary to controlling state law.

The above circumstances, which result in the panel's refusal to review and apply the District Judge's correct interpretation of Texas state law on resulting trusts, are made even more acute by the fact that the Fifth Circuit refuses to consider state law issues in en banc review. The Court's Internal Operating Procedure for Suggestion for Rehearing En Banc provides that "[a] lleged errors in the determination of state law...are matters for panel rehearing but not for rehearing en banc." *Id.*

Under the circumstances of this case, therefore, it was impossible for Petitioner to have the appropriate resulting trust law applied by the Fifth Circuit for the following reasons: (1) The panel erroneously refused to review the District Court's appropriate ruling, (2) the panel erroneously refused to rule otherwise even if the prior panel was in error, and (3) the en banc procedures precluded en banc review of state law issues.

Likewise, as previously stated, since the panel decision has failed to affirm the District Court's appropriate interpretation of Texas state law on resulting trust, the Appeals Court has also rendered a decision that will encourage forum shopping contrary to the principles of *Erie*.

Assuming arguendo that *Sentry I* did rule on the resulting trust claim,[16] as found by the panel decision, Petitioner respectfully submits that the discussion in *Sentry I* erroneously interprets Texas

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[16]Assuming arguendo that the language wasn't *obiter dictum*.

resulting trust law and that it will encourage forum shopping.[17]

Although the sole issue raised before the *Sentry I* panel was that of constructive trust, the *Sentry I* court briefly commented on the resulting trust doctrine by stating that, "[t]he resulting trust analysis does not apply to this case, however, because it requires evidence of a shared intent to establish such a relationship as claimed in this case." 715 F.2d at 946.

The court's comments are unquestionably in error. Texas law does not require "a shared intent to establish a strict fiduciary relationship" in order to impose a resulting trust. Indeed, Appendix M to this petition **contains a list of fifty Texas cases**, representing **all cases since 1955** in which the courts have discussed the issue of resulting trust, **none of which include a requirement of a shared intent to establish a strict fiduciary relationship.**

It is significant to note that *Sentry I's* statement that there is **no shared intent evidence in the record** is **in any event in error** and inconsistent with its accepted findings of the District Court. Indeed, the Court, in accepting the findings of the District Court, found, for example:

> "The findings of the District Court confirm that the **confidential[18] relationship between Whatley and Ward**

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[17]It again is significant to note that the "resulting trust" opinion (*Sentry III*) will now be encouraging even more forum shopping, since the "constructive trust" ruling of *Sentry I* had already set that area of the law up for forum shopping as well. Under that decision litigants breaking a fiduciary relationship encompassing the property at issue before the court will be encouraged to go to federal court. In all due respect, in a somewhat illogical opinion the *Sentry I* panel concluded that a breach of a fiduciary relationship regarding the property at issue before the Court is not sufficient to give rise to a "constructive trust." In an unprecedented interpretation of Texas law, the Court found that to give rise to a "constructive trust" there must be a breach of a prior, unrelated fiduciary relationship. Eg., *Sentry I*, 715 F.2d at 948, 950-951. See also Appendix L for a graphic illustration of this fact.

[18]Of course, "confidential relationship" and "fiduciary relationship" were used interchangeably by the Courts below. *Sentry I*, 715 F.2d at 946; see also Appendix I at 70.

The Court accepted these findings without challenge but, as previously stated, erroneously found that these facts were insufficient since they did not establish a prior fiduciary relationship unrelated to the property in issue. Contrary to holding the findings of the District Court "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure, "the District found as a fact that Whatley acquired the Dyckman tract on behalf of Ward and with the understanding that it would be transferred to Ward." *Id.* at 949.

> first arose when Ward became interested in the 490 acres, and that **'the agreement to buy the Dyckman property [the property in issue]**was **clearly within the scope** of that prior agreement **and made in furtherance of the prior agreement."**

In specifically accepting the factual findings which it found allegedly necessary to support a resulting trust, the Court of Appeals likewise found:

> **We accept,** nonetheless, the finding of the district court that there was an **oral contract** under which **Whatley would hold the title to the Dyckman tract on behalf of Ward...Even adding the additional finding** of the district court **that there was a fiduciary relationship** between the two, **we conclude** that the duty to transfer the property is **still unenforceable...**[as a constructive trust]

Id. at 949.

Importantly, however, the Court in the very same analysis later in the opinion held that such findings would support a "resulting trust":

> Without a written trust agreement, such an arrangement would be unenforceable under the Texas Trust Act. **The exception to this general rule [is] known as 'resulting trust'...**

Id. at footnote 4.

The ruling of the District Court applying the Texas law of resulting trust was correct since Texas law on resulting trust is not ambiguous. In Texas, a resulting trust arises by operation of law when title to real property is conveyed to one person but the purchase price is paid by another. *Cohrs v. Scott*, 338 S.W.2d 127, 130 (Tex. 1960). Accord *Olcott v. Bynum*, 84 U.S. 44, 59 (1873). A resulting trust does not arise from any agreement between the parties, but as a matter of law. It is predicated upon the equitable doctrine of consideration. *Knox v. Levy*, 251 S.W.2d 911, 915 (Tex. Civ. App.—Texarkana 1952), *rev'd on other grounds*, 152 Tex. 291, S.W.2d 289 (1953). The parties are "presumed to have intended that the grantee hold title to the use of him who paid the purchase price and whom equity deems to

be the true owner."*Cohrs v. Scott,* 338 S.W.2d at 131. It is only necessary that the equitable owner shall have paid *or* obligated himself to pay all or part of the purchase price for the property. *Hammett v. McIntire*, 365 S.W.2d 844, 847 (Tex. Civ. App.—Houston [14th Dist.] 1962, writ ref'd n.r.e.).

In accordance with *Erie* Petitioner respectfully submits that is was incumbent upon the Fifth Circuit, as it was upon the District Court, to rule consistently with the substantive state law of resulting trusts set forth above. As demonstrated herein, failure to adhere to this precept has resulted in an inequitable administration of the law in federal courts which will also result in forum shopping.

2. The Decision of the Fifth Circuit Violates the Due Process Clause of the Fifth and Fourteenth Amendments

Petitioner respectfully submits that a review of the circumstances of this case plainly indicates that he has been denied procedural and substantive due process under the Fifth and Fourteenth Amendments.

Contrary to the well recognized American constitutional principle that an individual must be afforded due process of law before he may be deprived of property, the Fifth Circuit decision has (1) erred in reversing the District Court decision on the basis that the resulting trust claim regarding Petitioner's property was previously adjudicated, and (2) erred in refusing to apply the controlling substantive Texas law on resulting trust even if the panel perceived the resulting trust ruling by the District Court applying Texas law to be correct and perceived the prior panel decision to have applied the wrong substantive state law on resulting trust.

Indeed, Petitioner's denial of procedural and substantive due process is made even more egregious by the fact that the Fifth Circuit does not allow decisions applying state law rights, even if erroneously decided, to be heard in en banc rehearing.

Providing litigants due process is, of course, of paramount concern to the federal and state judicial system. Moreover, a fair administration and review of the very law providing the litigant

his underlying rights[19] is the essence of due process.

For example, in articulating the underlying concepts of due process this court has recognized that,

> ...a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.

Carey v. Piphus, 435 U.S. 247, 262 (1977).

Likewise, inherent in the concept of due process is the principle that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause," *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 483 (1982). Due process is a relative concept taking its meaning at any given time, from the particular set of circumstances involved. *Id.; Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); Accord: *Carey v. Piphus*, supra at 266 (1978); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Moreover, as pertinent to this case, the standard of **due process** is one of ensuring "fundamental fairness" **throughout the course of judicial proceedings**. See, e.g., *Lassiter v. Department of Social Services*, supra at 24 (1981); *Goldberg v. Kelly*, supra; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *United Home Rentals, Inc. v. Texas Real Estate Commission*, 716 F.2d 324, 330 (5th Cir. 1983); *Pederson v. South Williamsport Area School District*, 677 F.2d 312, 317 (3rd Cir. 1982).

In *Goldberg v. Kelly*, this Court thus recognized that "the fun-

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[19]Consistent with *Erie*, state law of course provides Petitioner with the underlying resulting trust property protection which is being administered and reviewed by the federal system.

> **The law to be applied in the federal courts**, whether jurisdiction is premised on the presence of a federal question or on diversity, is that **law that is the source of the right** sued on.

Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 371 (1st Cir. 1980) (citing *Erie*; *First Southern Federal Savings & Loan Ass'n. v. First Southern Savings & Loan Ass'n.*, 614 F.2d 71 (5th Cir. 1980); *Maternally Yours, Inv. v. Your Maternity Shop, Inc.* 234 F.2d 538, 540-541 n. 1 (2d Cir. 1956).

damental requisite of due process of law is the opportunity to be heard."[20] *Id.* at 267.

Under the facts in this case, the **Fifth Circuit** has plainly **denied** Petitioner **a meaningful opportunity** to **have** his state law **resulting trust claim heard**, administered, and reviewed **fairly in the course of the judicial proceedings**.

Indeed, under the circumstances of this case **Petition was advised that** the **Circuit would not** even **correct** the application of state law to protect his property **if** the District Court was right and the **prior panel was wrong** as to his right to have his property protected through the imposition of a resulting trust.

In reviewing the particular circumstances of this case denying Petitioner due process, Petitioner, **at the outset**, respectfully submits that ***Sentry I* did not adjudicate the resulting trust claim**. Indeed, as previously stated, the prior panel specifically stated that it was deciding the constructive trust claim,[21] and that the resulting trust claim was not involved in the appeal.[22]

Moreover, who could possibly be in a better position to truly understand that the resulting trust claim had not gone up on appeal than the District Judge who, upon remand and review of the prior panel decision and mandate[23] nevertheless applied substantive Texas law to the facts of the case and concluded that a resulting trust should be imposed to protect Petitioner's property interests?

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[20]Petitioner would note that this principle is likewise consistent with the fundamental concept underlying *res judicata*, that the party has had a full and fair opportunity to litigate the issues involved. *Montana v. U.S.*., 440 U.S. 147, 153 (1970).

It is further significant to note that where different legal claims are presented, the decision in the first proceeding will not bar action in a second proceeding on a different claim. *Pipeline Co. v. U.S.*, 312 U.S. 502, 508 (1941). Moreover, the evidence to support a resulting trust differs materially from that of a constructive trust.

[21]*Sentry I*, 715 F.2d at 949, note 4.

[22]*Id.*

[23]The law is well established that a District Court may consider and determine any matters not addressed by the mandate. *Sprague v. Ticonic*, 307 U.S. 161, 168 (1939); *Ex parte v. Union Steamboat Co.*, 178 U.S. 317, 319 (1900); *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895).

The action of the panel in *Sentry III* thus eliminated Petitioner's right to have his property interests regarding resulting trust heard and protected in accordance with controlling state law in violation of due process.

Additionally, the panel denied Petitioner due process when it concluded that it could not affirm the District Court's application of Texas law on resulting trust even if it perceived the decision to be correct and the decision of the prior panel to be in error.

The panel reached its erroneous conclusion upon holding that in the Fifth Circuit "...the law-of-the case doctrine is supplanted by our firm rule that one panel **cannot disregard** the **precedent** set by a prior panel **even though** it **perceives error** in the precedent." *Sentry III*, 806 F.2d at 1282.

Even assuming that this formulation of the Fifth Circuit's rule is correct, it operates to deny due process because the en banc court in accordance with the I.O.P. to Rule 35 **will not review state law issues.** Rather, **state law questions** are **left to the panel to ensure** that the **federal court correctly applies** controlling **state substantive law**. See Appendix K.

3. The Decision of the Fifth Circuit Violates Petitioner's Right To Equal Protection Under the Laws

Petitioner respectfully submits that the panel decision has operated to deny him equal protection under the law though required by the Fifth[24] and Fourteenth Amendments.

At the outset, it is significant to note that upon satisfaction of the IRS claims in the interpleader action which caused this case to be removed from state to federal court, Petitioner sought to have the remainder of the case solely involving state law issues involving his property interests removed back to state court for state adjudication of the issues. See Appendix G and H.

Petitioner humbly and respectfully submits, therefore, that if the federal system is to insist upon resolving his state law property interests, fundamental fairness and common sense require that the federal system assure that his state law property interests

[24]It is well settled that the Fifth Amendment's due process clause encompasses equal protection principles. *Matthews v. DeCastro*, 429 U.S. 181, 182 at note 1 (1976).

be resolved in a manner consistent with his right to equal protection of the laws.

A review of the circumstances brought about by the panel decision plainly evidences that Petitioner has not been given the same application of the controlling law regarding his property interests that would have been provided in the state court. Indeed, it is significant to note that the panel would not provide a correct ruling on Petitioner's state law issue of resulting trust even if it perceived error.

Importantly, this Court reaffirmed in *Hanna v. Plumer* that with respect to litigation in federal courts involving substantive state law issues, it is inherent in the concept of equal protection "that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in federal court." 380 U.S. 460, 467 (1965). Indeed, *Hanna* further recognized that this concept in part formed the basis for the decision in *Erie*. *Id.*

Accordingly, the Fifth Circuit contrary to the dictates of equal protection plainly failed to affirm the District Court's correct application of the Texas law of resulting trust. Far to the contrary, the panel even expressly found that it would not apply the District Court's correct application of state law even if the prior panel's alleged ruling on resulting trust is in error.

Importantly, if the panel refuses to adhere to its own I.O.P. providing that state law issues are for panel reconsideration rather than en banc reconsideration, then the Fifth Circuit through its rules of decision has effectively extinguished any device in the Circuit to correct prior panels' misinterpretation and misapplication of controlling state law regardless of how wrong or erroneous its consequences.

Indeed, as specifically acknowledged by this Court:

> **neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules** which are **not supported by** a grant of federal authority contained in Article I or some other section of the Constitution; in such areas **state law** must govern **because there can be no other law.**

Hanna v. Plumer, 380 U.S. at 471-472.

Moreover, even assuming that the panel correctly applied its rules and procedures, the manifest injustice resulting from the prior panel's clearly erroneous decision must be corrected. See, *White V. Murtha,* 377 F.2d 428, 431 (5th Cir. 1967).

While Petitioner recognizes the salutary and sound policy underlying the need to bring an end to litigation, Petitioner respectfully submits that the **fundamental principles of equal protection** established by a long line of cases by this Court **cannot be sacrificed** for the mere **sake of form over substance in the judicial process**.

In administering the substantive rights of litigants through our judicial system, fundamental consideration for due process and equal protection dictates that our system operate as a shield to protect the rights of individuals as opposed to a sword.

4. The Decision of the Fifth Circuit Violated the Rules of Decision Act

In addition to the previously discussed violations of Petitioner's constitutional rights and violations of judicial policy enunciated in *Erie*, Petitioner respectfully submits that the panel decision has likewise violated the Rules of Decision Act.[25]

As the Court is aware, the Rules of Decision Act[26] directs federal courts to apply state substantive law except where federal issues are involved.

As previously discussed and demonstrated, it is clear that the panel decision, in refusing to affirm the ruling of the District Court applying Texas substantive law on resulting trust, chose not to concern itself with whether Texas substantive law was correctly applied.[27]

5. In Light of the Constitutional Violations and Manifest Injustice Brought About For Petitioner and Innumerable State Law Litigants in Federal Court, This Court Should Exercise Its Supervisory Authority

In accordance with Supreme Court Rule 17.1 (a), exercise of

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[25]28 U.S.C. Section 1652 (1976).

[26]We submit, consistent with Article III of the United States Constitution.

[27] See *Sentry III* 806 F.2d at 1282.

the Court's broad supervisory authority is warranted since the Fifth Circuit has failed to decide a substantive state law issue consistent with controlling state law. It is well established that the Court has elected to exercise its supervisory authority in instances calling into question proceedings in the federal courts. See, e.g., *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 381 (1953); *Defense Corp. v. Lawrence Co.*, 336 U.S. 631, 639, (1948); *Missouri, ex rel. v. Public Service Commission*, 273 U.S. 126, 131 (1926); *Dorchy v. Kansas*, 264 U.S. 286, 289 (1923).

Petitioner respectfully submits that as shown above, since the Fifth Circuit's decision on issues of substantive Texas law are clearly incorrect, this Court in exercising its supervisory authority may overturn the court below. *Estate of Spiegel v. Commissioner of Internal Revenue*, 335 U.S. 701, 708 (1949); *Helvering v. Stuart*, 317 U.S. 154, 163 (1942).

Alternatively, the Court may direct the court below to certify the state law issue of resulting trust to the Texas Supreme Court for a determinative resolution of the controlling state law. *Mills v. Rogers*, 102 S.Ct. 2442, 2452 (1982); *Bellotti v. Baird*, 428 U.S. 132, 150-151 (1975); *Lehman Brothers v. Scheir,* 416 U.S. 386, 390-391 (1973).

Certification of state law issues is consistent with the dictates of *Erie* and case law establishing the right of state courts to be the "final expositors" on state law issues. *Brady v. Maryland*, 373 U.S. 83, 90 (1963); *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944). It is also consistent with the policies of comity and a system of "cooperative judicial federalism." *Bellotti v. Baird*, supra at 151.

Importantly, Texas recently enacted Rule 114 authorizing a certification procedure. Certification of the substantive state law issue of resulting trust would provide the same result and correct the constitutional deprivations occasioned by the Fifth Circuit, as if the District Court had originally granted Petitioner's Motion to Remand after dismissal of the IRS.

Rule 114 also authorizes review by the Texas Supreme Court of state law issues certified to it by this Court.

While Petitioner strongly maintains that this Court should grant certiorari and reverse the panel decision for its patently unconstitutional results, Petitioner submits that at a minimum, the

Fifth Circuit should be directed to have the state law issue certified to the Texas Supreme Court for resolution.

In fact, certification to the Texas Supreme Court under the circumstances of this case would render far more equitable results for Petitioner and future state law litigants than simply allowing the panel decision to stand. Indeed, the panel decision itself in interpreting the rules of judicial administration in the Fifth Circuit, found that it could not provide a different application of Texas law than that allegedly provided by the prior panel in *Sentry I* even if it was thoroughly convinced the decision was in error.

As likewise previously discussed, this inequity is rendered even more untenable by the fact that the Fifth Circuit refuses to hear state law issues in en banc proceedings.

When one considers the fact that of all the Texas decisions reviewed in the area of resulting as well as constructive trusts, the Petitioner has found no cases[28] ruling consistent with the interpretations of Texas law in the *Sentry* decisions, it seems that on balance, certification at a minimum is warranted with no prejudice to the Fifth Circuit and to avoid undue prejudice to Petitioner and innumerable litigants.

Finally, in all due respects, Petitioner submits that the error rendered by the panel decision in the circumstances of this case clearly warrants exercise of the supervisory authority of this Court.

To truly understand the unfair, inequitable and manifestly unjust results imposed upon Petitioner, it is perhaps appropriate to review this case in perspective.

Indeed, while this decision is on appeal now regarding the resulting trust claim, as opposed to the constructive trust claim, in an attempt to protect Petitioner's property rights under Texas law, the strong exception to *Sentry I* stated by Judge Will still aptly characterizes the circumstances of this case:

> ...the basic error of the majority holding remains uncorrected. A man who admittedly breached his

[28]See Appendix L and M.

> fiduciary duty[29] is still to be rewarded by receiving what now appears to be in excess of [$800,000] when neither the uncontested facts nor the Texas [or Fifth Circuit] law justify, much less require, such an unjust and inequitable result.
>
> ...

Sentry II, 727 F.2d at 1373.

> ...
>
> I cannot in good conscience join in a decision which will reward perfidy and breach of trust with more than [$800,000], an amount which even in Texas, must be substantial.

Sentry I, 715 F.2d at 961.

Indeed, consistent with Judge Wills' remarks, in all due respect, the prior panel decision was illogical in its reasoning and impact on Petitioner. Incredibly, the decision concluded that while a fiduciary relationship did in fact exist regarding the very property in issue and concluded that it was in fact the understanding of the parties that Respondent was holding the property on behalf of Petitioner, the court in an unprecedented ruling found that to impose a constructive trust protecting Petitioner's property rights, there must have been a fiduciary relationship regarding a totally unrelated transaction!

By requiring that there be a separate unrelated fiduciary relationship, the decision consistent with Judge Wills' remarks, allows a breach of a fiduciary relationship regarding the very property at issue to be rewarded.

As pertinent to the present decision on appeal to the Court regarding the resulting trust claim in an attempt to protect Petitioner's property rights, it is significant to note that the District judge who originally decided the case still considered it appropriate and necessary to apply the resulting trust remedy provided by Texas law.

The District Court decision notwithstanding, however, the Fifth Circuit has once again exacerbated the inequitable results of Petitioner being required to litigate his state law property claims in

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[29]As previously demonstrated, the prior panel as well as the present panel accepting the prior decision, have specifically recognized that a fiduciary relationship existed regarding the very property at issue in this litigation.

federal court, by now incredibly concluding that the resulting trust claim was adjudicated in the prior appeal when the District Judge thinks otherwise, and the prior panel decision itself stated, (1) its decision was limited to the constructive trust claims; (2) resulting trust was not involved in the appeal; and (3) under the facts presented, the only exception the Court saw as providing a remedy was the Texas law of resulting trust which was not involved in the appeal before the Court.

Finally, as though it was not enough to ignore Petitioner's state law resulting trust claim ruled favorably upon by the District Court, the panel has now stated that under the rules of the Fifth Circuit its hands are tied to provide Petitioner his state law remedy of resulting trust, even if the District Court decision is correct and the prior panel decision is wrong!

While this case has previously been before the Court on Petition for Certiorari regarding the constructive trust claim, the further decision of the Circuit Court has now raised this case to a level of patent violation of constitutional rights and to a level of public import that cries for relief and ought not to be ignored.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Hiram C. Eastland, Jr.
(Counsel of record for Petitioner)
Eastland Law Offices
6360 I-55 North, IBM Building
Jackson, Mississippi 39211
(601) 956-0154

CERTIFICATE OF SERVICE

I, Hiram C. Eastland, Jr., one of the attorneys for Petitioner herein, am a member of the bar of the Supreme Court of the United States, hereby certify that on the 6th day of May, 1987, I served copies of Petitioner's foregoing Petition for a Writ of Certiorari on the party hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

1. J. Albert Kroemer, Esq.
   Mathews, Kroemer & Johnson
   2000 One Main Place
   Dallas Texas 75252

I further certify that all parties required to be served have been served.

Hiram C. Eastland, JR.

Hiram C. Eastland, Jr.

No. 86-1791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TRAVIS WARD
Petitioner

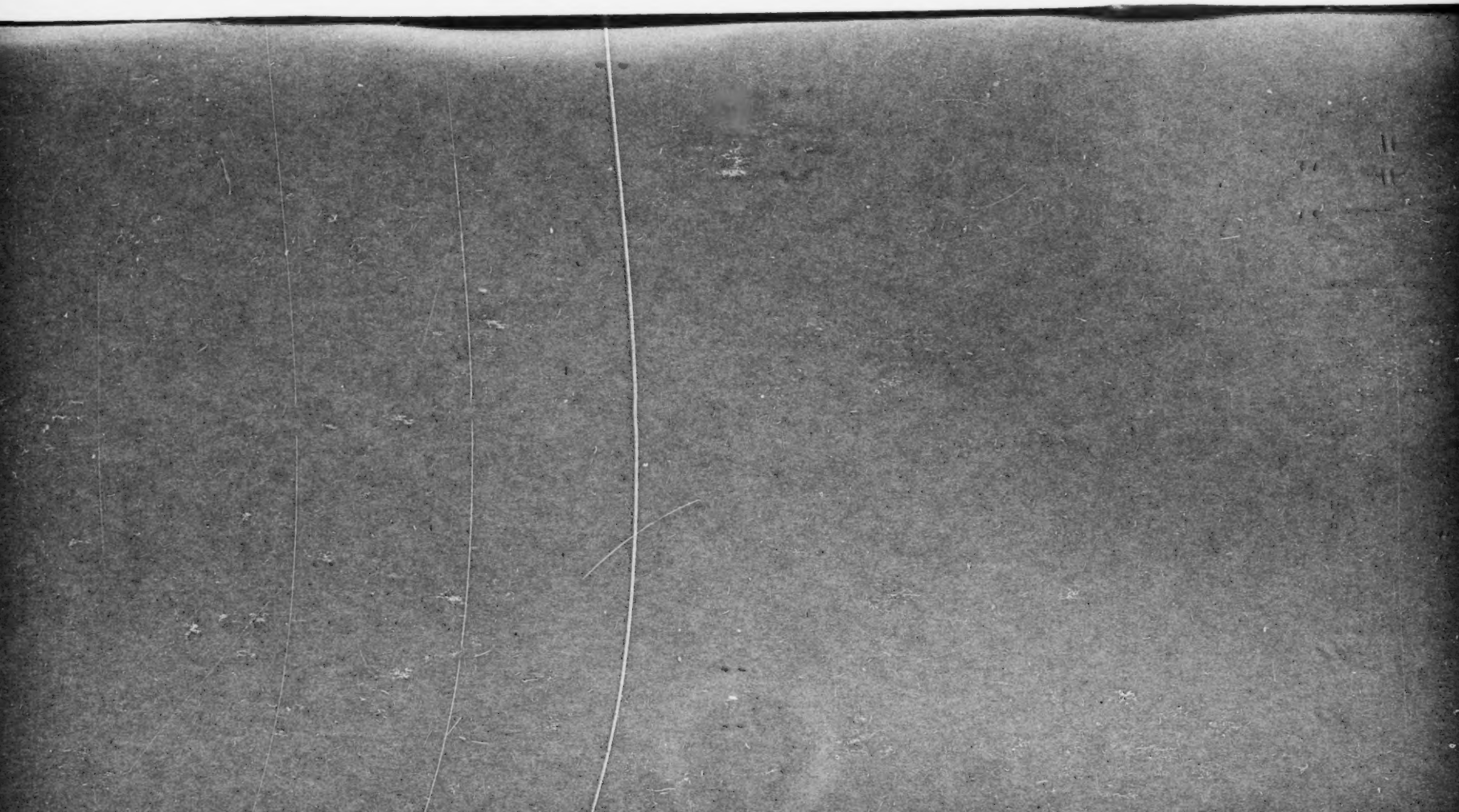
v.

SENTRY TITLE CO., INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

HERITAGE GRAPHICS - (601) 981-2161 - JACKSON, MS 39206



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1805

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY TITLE CO., HOME ENGINEERING, INC. and ALAN WHATLEY, DEFENDANTS-APPELLANTS.

versus

TRAVIS WARD, DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinon 01/07/87, 5 Cir., 198, F. 2d)

Before, BROWN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

PATRICK E. HIGGINBOTHAM

United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1805

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY TITLE CO., HOME ENGINEERING, INC. and ALAN WHATLEY, DEFENDANTS-APPELLANTS.

versus

TRAVIS WARD, DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

ORDER:

IT IS ORDERED that the motion of appellee for stay of the issuance of the mandate to and including May 6, 1987, pending petition for writ of certiorari, is GRANTED.

IT IS FURTHER ORDERED that the motion of appellants to issue mandate is DENIED.

IT IS FURTHER ORDERED that the alternative motion of appellants to condition any stay on the posting of an adequate supersedeas bond is DENIED.

PATRICK E. HIGGINBOTHAM
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1805

Docket No. CA-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY TITLE CO., HOME ENGINEERING, INC. and ALAN WHATLEY, DEFENDANTS-APPELLANTS.

versus

TRAVIS WARD, DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Before, BROWN, RANDALL and HIGGINBOTHAM, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgement of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to defendants-appellants the cost on appeal, to be taxed by the Clerk of this Court.

January 7, 1987

ISSUED AS MANDATE:

APPENDIX D

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 85-1805

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY TITLE CO., INC.,
HOME ENGINEERING, INC. and ALAN WHATLEY,
DEFENDANTS-APPELLANTS

versus

TRAVIS WARD, DEFENDANT-APPELLEE.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

(January 7, 1987)

REHEARING AND REHEARING EN BANC DENIED FEBRUARY 5, 1987

Plaintiff brought suit seeking recovery on theories of both resulting trust and constructive trust. The United States District Court for the Northern District of Texas, Robert Madden Hill, J., entered judgment in favor of plaintiff, and the Court of Appeals, 727 F.2d 1368, reversed and remanded. On remand, the District Court entered judgment in favor of plaintiff, and appeal was taken. The Court of Appeals held that theory of resulting trust was not dictum but was actually considered on prior appeal of case; therefore, on remand after reversal of district court judgment in favor of plaintiff on theory of constructive trust, district court could not enter judgment in favor of plaintiff on resulting trust theory.

Reversed and remanded,

Federal Courts 954

Theory of resulting trust was not dictum but was actually considered on prior appeal of case seeking recovery on theory of both resulting trust and constructive trust; therefore, on remand after reversal of district court judgment in favor of plaintiff on constructive trust theory, and direction that district court enter judgment in favor of defendant, district court could not enter judgment in favor of plaintiff on resulting trust theory.

J. Albert Kroemer, Dallas Tex., for defendants-appellants.

Michael Rhode, Dallas, Tex., James P. Coleman, Ackerman, Miss., Rohde, Chapman & How, Michael Keeley, Dallas, Tex., Hiram C. Eastland, Jr., Jackson, Miss., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

This case comes to this Court on its second appeal. *See Harris v. Sentry Title Co.*, 715 F2d. 941 (5th Cir. 1983), *modified in part*, 727 F.2d 1368 (5th Cir. 1984), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2679, 81 L.Ed.2d 874 (1984). The facts and procedural history of this case are set forth extensively in the prior opinions. For purposes of this appeal, it is sufficient to note that the controversy first appealed to this court centered on whether appellee Travis Ward was entitled to a trust implied by law on the proceeds of the sale of certain real property purchased in the name of Alan Whatley or companies controlled by Whatley. Ward urged at least two theories of recovery before the trial court: resulting trust and constructive trust. The district court originally imposed a constructive trust on the proceeds in favor of Ward; the district court did not decide the question of resulting trust but noted that "all other relief not expressly granted herein is denied." On appeal, this Court reversed the district court and directed that judgment be rendered in favor of defendant-appellant Sentry Title Co. (a company of which Whatley was the controlling shareholder). On a motion to recall the mandate, this Court directed that its original mandate should issue. This Court fur-

ther directed that the district court was to allow Ward certain deductions and to consider the interest to be paid to Sentry Title. 727 F.2d at 1371.

On remand, however, the district court again granted judgment in favor of Ward. The district court made no additional findings of fact. It did, however, make additional conclusions of law. In doing so, the district court noted the limited language of this Court's opinion on the remand. The district court held (1) that this Court had not addressed the issue of whether Ward was entitled to recovery on a theory of resulting trust, and (2) that Ward was entitled to judgment on this theory.

It cannot be disputed that "when the further proceedings [in the trial court] are specified in the mandate [of the Court of Appeals], the district court is limited to holding such as are directed." 1B *Moore's Federal Practice* ¶ 0.404(10), at 172 (1984). *See Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948). Thus, the initial question in the instant case is whether this Court determined on the prior appeal whether Ward should be able to proceed on a theory of resulting trust in the district court. Ward argues that this Court's prior discussion of the theory of resulting trust should be dismissed as obiter dicta. *See Peques v. Morehouse Parish School Board*, 706 F.2d 735 (5th Cir. 1983) (prior Court's statements constituted dictum where Court remanded that issue to district court for consideration). On the prior appeal, this Court stated with regard to the issue of resulting trust:

> A constructive trust must also be distinguished from a resulting trust. A resulting trust is an actual, binding trust that can develop where the parties intended a confidential or fiduciary relationship to develop and acted accordingly, but failed to create a valid actual trust agreement. A resulting trust can occur, for example, where one party buys real property with the funds of another with the understanding that the property is being held for the party that provided the money. The resulting trust analysis does not apply to this case, however, because it requires evidence of a shared intent to establish a strict fiduciary relationship. No shared intent to establish such a relationship is claimed in this case. The issue of resulting trust is not raised by any party.

715 F.2d at 946. While this Court's statement, taken in an isolated fashion, arguably could be construed as dictum,[1] *see* 1B *Moore's Federal Practice*¶ 0.402[2], at 37 (1984), the Court's opinion must be read as a whole. This Court obviously was well aware that the theory of resulting trust was an alternative theory on which Ward might possibly have recovered in the district court. In any event, since this Court had previously considered the alternative theory of resulting trust and rejected it, the Court specifically directed that judgment be entered in favor of Sentry Title:

> We reverse that part of the judgment awarding the remainder of the Interpleader fund to Ward and render judgment for that amount to Sentry Title Co., Inc., record title holder of the Dyckman property at the time of the foreclosure sale.

715 F.2d at 951.

That the theory of resulting trust was considered on the prior appeal is further reinforced by the strong dissent that was put forth by the Hon. Hubert L. Will, sitting on this Court by designation. After disagreeing with the majority's analysis that a constructive trust did not apply, the dissent turned to the theory of resulting trust:

> As previously noted, resulting as well as constructive trusts are an exception to the Texas Trust Act's inhibition against oral real estate trusts. While I think the facts here clearly warrant

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1. It is common practice for this Court to consider theories other than that relied upon the district court in order to consider whether the judgment of the district court may be affirmed on an alternative ground. Often the Court will ask the parties to submit supplemental briefs to assist the Court in this effort. Here, the Court on the prior appeal addressed an issue which required no further factfinding by the district court and which had been briefed by the parties in trial briefs included in the record. Such action promotes the finality of litigation, consistent with the goal that "the federal system aims at a single judgment and a single appeal." 1B *Moore's Federal Practice*¶ 0.404[10], at 169 (1984). Similarly, this Court often addresses issues for the guidance of the parties and the district court on remand. It cannot be said that such considered statements should be dismissed as dictum simply because the Court was not absolutely required to raise and address such an issue. Such statements constitute the "professed deliberate determinations of the [court]" and, when done in this fashion, may not be summarily dismissed as dictum. *See Black's Law Dictionary* 409 (5th ed. 1979).

> the District Judge's finding of a constructive trust, those findings also, in my opinion, clearly establish a resulting trust. As the majority recognizes, a resulting trust arises when one party buys real property with the funds of another with the understanding that the property is being held for the party that provided the money. The majority asserts that the resulting trust analysis does not apply in this case because the evidence fails to demonstrate an intent to establish a fiduciary relationship.
>
> The District Court found, however, that such a fiduciary relationship had been established, that Whatley or his companies had purchased and held the Dyckman property with Ward's money and for his benefit and that Whatley's refusal to convey the property to Ward was a breach of that fiduciary duty. Those uncontested findings, it seems obvious to me, establish a resulting trust. *See, e.g. Atkins v. Carson*, 467 S.W.2d 495, 500 (Tex. Civ. App. 1971); *Grasty v. Wood,* 230 S.W.2d 568 (Tex. Civ. App. 1950); *cf. Carson v. White,* 456 S.W.2d 212 (Tex. Civ. App. 1970) (no resulting trust absent evidence of the source of the funds used to purchase the property).
>
> The fact that Ward has not urged the resulting trust analysis or that the District Court found a constructive trust rather than a resulting trust or both does not change the facts or warrant the majority's dogged refusal to acknowledge that Texas law would impose a resulting trust on the basis of those unchallenged facts. All concerned understood that Whatley was acting in connection with the Dyckman property on behalf of Ward until 1972 when Whatley for the first time sought to deny it. Unless this Court rejects the District Court's uncontested findings, which it is my understanding an appellate court may not do, all the elements of a resulting trust are here present.

715 F.2d at 961. The dissent closed with the observation that the majority's analysis resulted in judgment for the Whatley interests and, specifically, Sentry Title. In the face of this dissent, this Court (the majority) remained steadfast that judgment be entered in favor of Sentry Title.

Ward filed a petition for rehearing and rehearing en banc in which he raised the issue of resulting trust. This Court denied

the motions and left its original mandate intact. Similarly, this Court did not alter the substance of its judgment even when it modified its mandate permitting the district court to consider two relatively minor issues. This Court specifically noted that these two issues were to be the only issues considered on remand:

> *Our original decision* in this case, 715 F.2d 941 (5th Cir. 1983), *stands unchanged* except as follows: The case is returned to the district court *solely* for the court to determine (1) the amount of money which appellee Ward is entitled to deduct as his actual out-of-pocket expenditures, plus interest in the discretion of the district court, in connection with the Dyckman tract purchases as he complies with the mandate of the Court to pay over to Sentry Title the proceeds from the sale of the Dyckman tract, and for the court to determine (2) the interest which should be paid to Sentry Title by Ward on the sum to which Sentry Title is entitled under our mandate as proceeds from the Dyckman tract after deduction of Ward's actual costs advanced in the purchase and maintenance of title in the Dyckman tract and commencing on the date the funds plus accrued interest were paid from the registry of the court to appellee Ward.

727 F.2d at 1371 (emphasis added). It should also be noted that consideration of these remanded items were consistent only with a judgment in favor of Sentry Title.[2]

We are constrained to hold that the district court erred in reconsidering the issue of resulting trust. This Court's previous

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2. This Court's opinion in *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981), does not dictate a contrary result. There, this Court held that the district court, after complying with this Court's mandate, could grant a motion for new trial on a ground not previously considered by the trial court or this Court. No mention of the alternative ground was included in this Court's prior opinion. In the instant case, the district court did not comply with the mandate and this Court's opinion, when read as a whole, addressed the issue of resulting trust.

   We also not that this Courts prior denial of a petition of mandamus sought by Sentry Title to prevent consideration of the resulting trust issue should not be considered as approving the district court's action. *See Key v. Wise*, 629 F.2d 1049, 1055 (5th Cir. 1980), *cert. denied*, 454 U.S. 1103, 102 S.Ct. 682, 70 L.Ed.2d 647 (1981). *See generally* 1B *Moore's Federal Practice*¶0.402[2], at 31-32 (1984).

statements cannot be dismissed as dictum, and the dictum, and the district court's determination was outside the mandate of this Court. While we admire the dedication of the trial judge in examining the issue of resulting trust, it must be held that this reexamination yield to the finality of this Court's determination.

Finally, this panel of this Court may not overrule the prior determination of another panel of this Court that judgment should be entered in favor of Sentry Title. *See United States v. 162.20 Acres of Land,* 733 F.2d 377, 379 (5th Cir. 1984), *cert. denied,* 469 U.S. 1158. 105 S.Ct. 906, 83 L.Ed. 2d 920 (1985). As this Court has noted in previous cases, "In this circuit,...the law-of-the-case doctrine is supplanted by our firm rule that one panel cannot disregard the precedent set by a prior panel even though it perceives error in the precedent." *Id.* In the instant case, we see no grounds or "manifest injustice" requiring a reexamination of the Court's prior opinion. *See William G. Roe & Co. v. Armour & Co.,* 414 F.2d 862 (5th Cir. 1969)

It appears that the district court has not yet considered the two grounds (to which it was limited) which were in fact left to its determination on the prior appeal. The judgment of the district court in favor of Ward is reversed and the case is remanded to the district court to consider only those issues as set forth in the Court's prior opinion. 727 F.2d at 1371.

REVERSED AND REMANDED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1108

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY TITLE COMPANY, INC., Et Al.,
DEFENDANTS-APPELLANTS,

versus

TRAVIS WARD,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(March 12, 1984)

ON MOTIONS FOR RECALL OF MANDATE

Before, WILLIAMS and JOLLY, Circuit Judges,
and WILL*, District Judge.

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*Hon. Hubert L. Will, Senior District Judge
of the Northern District of Illinois,
sitting by designation.

PER CURIAM:

In this case we reversed and rendered the decision of the district court impressing a constructive trust in favor of appellee, Travis Ward, on the proceeds from the sale of property owned by Sentry Title. 715 F.2d 941 (5th Cir. 1983). Suggestion for rehearing en banc and motion for panel rehearing by appellee, Ward, were denied on October 26, 1983. On November 16, 1983, we entered an Order denying appellee's motion for stay of mandate.

We now have before us appellee's motion for recall of mandate under Fifth Circuit Local Rule 41.2, which provides: "A mandate once issued shall not be recalled except to prevent injustice." Two grounds are claimed. The first and important ground is the assertion that our decision in refusing to impress a constructive trust in favor of Ward against Sentry Title on the proceeds from the sale of the land involved was erroneous. This ground constitutes the same attack upon our decision that was made in the motion for panel rehearing and the suggestion for rehearing en banc. In addition, appellee moves for recall of the mandate on the ground that Ward had contributed certain specific sums of money to the purchase of the property at issue and any judgment should provide that Ward was entitled to reimbursement for those sums out of the judgment rendered in favor of Sentry Title.

Sentry Title files a motion to recall the mandate claiming the right to interest on the proceeds from the sale of the property, which were paid to Ward from the registry of the district court following the judgment of the district court, which sums Sentry Title is now entitled to under the judgment of this Court.

The facts of this case are fully reported in our opinion cited above. We do not repeat them here. On the fundamental issue raised by appellee asserting that we were in error in refusing to impress a constructive trust on the proceeds of the sale of the tract at issue, the Dyckman property, we follow our prior decision and deny the motion to recall the mandate. Appellee argues, as do amici curai the Texas Independent Producers and Royalty Owners Association and the Greater Dallas Board of Realtors, that we misapplied Texas law by requiring a prior relationship of trust and confidence between the parties of "long duration" before a constructive trust could be recognized. In this case

whatever was the relationship between Ward and Whatley, the parties involved, it was not of long duration.

The emphasis upon long duration of the prior relationship of trust and confidence between the parties comes from the wording of various Texas decisions. It is not at all a controlling factor, but it is only one factor to be considered. We clearly recognized this in our original decision. A careful reading of our opinion reveals that we did not rely upon a requirement of long duration of prior relationship of trust and confidence. To the contrary at the beginning of our discussion of the issue and at the end of our discussion of the issue, we did not refer to long duration of the relationship at all. At the beginning of our discussion, 715 F.2d at 946, we stated, "In recognizing a constructive trust, the critical requirement for purposes of this case is that the parties have a confidential or fiduciary relationship prior to and apart from the transaction in question." There is no mention of length of such a relationship. Then at the end of our opinion where we state our holding, in the section entitled "Conclusion", we say: "We find that the district court erred in finding a pre-existing confidential relationship between Ward, Whatley, and Hart prior to and separate from the Dyckman tract transactions." *Id.* at 950. In that final conclusory section there is no reference whatsoever to a requirement of "long duration".

We recognize that the Texas law, in the absence of fraud, places almost controlling emphasis upon the requirement that there must be a *pre-existing* confidential relationship of trust and confidence between the parties before the dealings which give rise to a constructive trust. There was no such pre-existing relationship in this case. As the facts clearly reveal, the relationship of trust and confidence between Ward and Whatley began with the dealings relating to Whatley serving as Ward's "front" to bid on the 490 acre tract owned by Tarrant County. Both of the other real estate dealings in question are directly tied into that fundamental transaction. They are not separate and independent dealings. The first of these is the agreement under which Ward aided Whatley in taking up an option to buy some land in Athens, Texas. It is clear from the record that this agreement by Ward was a quid pro quo for Whatley bidding for Ward on the Tarrant County land.

The land deal which is at issue in this case, the Dyckman tract deal, was directly related to the undertaking to purchase the Tarrant County tract. It was understood between the parties that if Ward could obtain the Dyckman land, again using Whatley as a "front", it might help Ward in his dispute with Tarrant County concerning the bidding on the 490 acre tract. One could hardly imagine a more close knit relationship between the Dyckman tract deal and the original Tarrant County bidding. The Tarrant County land deal cannot serve to establish a pre-existing relationship for the Dyckman land deal. It follows there was no pre-existing relationship of trust and confidence between Ward and Whatley before their dealings began to obtain the 490 acre tract from Tarrant County by way of bid. Then, both the Athens land deal and the Dyckman tract deal were inextricably interwoven with that fundamental business relationship, the only business relationship between the parties.

Since the agreement on the Dyckman tract was oral, and since it was not based upon a pre-existing confidential relationship involving separate and independent relations between the parties, the Statute of Frauds, applied with full force to that deal, and no constructive trust could be created. As we stated in our original opinion, this is the very kind of situation the Statute of Frauds was meant to control. There is a noticeable lack of discussion of the Statute of Frauds and its purpose in the briefs of appelless on this issue. We recognize that each case under Texas law turns upon its own facts. The facts were established and found by the district court, but under those facts the requisites to the establishment of the constructive trust in Texas law were not met.

Appellee Ward's motion for recall of the mandate on the ground that Ward is entitled to certain funds advanced to Whatley for the purchase of the Dyckman tract is GRANTED. The Court felt that it was clear from its opinion that those sums could be retained by Ward when the other sums which Ward had received from the registry of the court after the district court's judgment were turned over to Whatley in accordance with our mandate. In view of the claims now made by Ward, we cannot tell precisely from the record the amount of money involved to which Ward is entitled. We therefore modify the mandate to remand rather than render so that the district court can determine that

sum with precision on the basis of its findings. This conclusion is also related to the modification of our mandate to reverse and remand contained in the next paragraph.

We GRANT the motion of appellant Sentry Title to recall the mandate. We reverse and remand to allow the district court to determine what interest if any is payable to Sentry Title in its recovery from Ward of the sums to which it is entitled under our decision after the amount in the registry of the district court was paid to Ward pursuant to the judgment of the court.

In summary: we recall our mandate in this case. The judgment of the district court is REVERSED and REMANDED to the district court for further proceedings and entry of judgment in accordance with this opinion. Our original decision in this case, 715 F.2d 941 (5th Cir. 1983), stands unchanged except as follows: The case is returned to the district court solely for the court to determine (1) the amount of money which appellee Ward is entitled to deduct as his actual out-of-pocket expenditures, plus interest in the discretion of the district court, in connection with the Dyckman tract purchases as he complies with the mandate of the Court to pay over to Sentry Title the proceeds from the sale of the Dyckman tract, and for the court to determine (2) the interest which should be paid to Sentry Title by Ward on the sum to which Sentry Title is entitled under our mandate as proceeds from the Dyckman tract after deduction of Ward's actual costs advanced in the purchase and maintenance of title in the Dyckman tract and commencing on the date the funds plus accrued interest were paid from the registry of the court to appellee Ward.

REVERSED AND REMANDED.

Harris v. Sentry Title Co., Inc.

No. 82-1108 (5th Cir.)

WILL, District Judge, dissenting:

In its September 26, 1983 opinion in this matter, the majority of this panel accepted the unchallenged finding of the District Court below that the business dealings between Travis Ward and Alan Whatley began months before those two had any discussion about acquiring the so-called Dyckman property, the subject-matter of this lawsuit. 715 F.2d at 948. The majority necessarily

also accepted the District Court's additional, unchallenged finding of fact, *see Smith v. Bolin,* 153 Tex. 486, 271 S.W.2d 93, 97 (1954), that those earlier business dealings created a fiduciary relationship between Ward and Whatley. 715 F.2d at 949.

The majority held, however, that the prior fiduciary relationship between Ward and Whatley was not of sufficient long standing to justify the imposition of a constructive trust:

> *To show a constructive trust, a plaintiff must first show,* by a preponderance of the evidence, . . . that the parties had a *long-standing* fiduciary or confidential trusting relationship unrelated to the subject transaction. . . whether or not a fiduciary relationship exists is a question of *fact,* . . . but whether a relationship is sufficiently *longstanding* to support imposition of a constructive trust is a question of law. . . We find as a matter of law that the dealings between Ward and Whatley in this case were not sufficiently *longstanding* to support the district court's application of a constructive trust. [Emphasis added.]

715 F.2d at 948.

And again, the majority said:

> Even if one were to count the additional time during which Whatley's companies held the tract, it would be difficult on the facts of this case to find a *longlasting* independent relationship between Ward and Whatley or his companies." [Emphasis added.]

Ibid. at 949.

Finally the majority re-emphasized its position later in its opinion:

> The business dealings between Ward and Whatley, whatever their nature, were not of *sufficient duration* or intensity to justify the imposition of a constructive trust. *The first of the two requirements to establish a constructive trust was not met.* [Emphasis added.]

Ibid. at 949.

I would not have dissented on September 26, 1983 had it not been the case (1) that Ward and Whatley, as a matter of undisputed fact, had a fiduciary relationship prior to their decision

to acquire the Dyckman property and (2) that, considering this fact, Texas law would permit the imposition of a constructive trust without, as the majority's original opinion clearly held, an absolute first requirement that the prior relationship have been "long-standing," "long-lasting," or of "sufficient duration."

The majority appears now to concede that its earlier view of the Texas law was incorrect:

> A careful reading of our opinion reveals that we did not rely upon a requirement of long duration of prior relationship of trust and confidence. To the contrary at the beginning of our discussion of the issue and at the end of our discussion of the issue, we did not refer to the long duration of the relationship at all.

Per Curiam Opinion of_____at 3. With all due respect, the majority opinion stated categorically as quoted above that a "long-standing" or "long-lasting" fiduciary relationship is, under Texas law, the *first* requirement of a constructive trust.

Moreover, the headnotes for the original published opinion, 715 F.2d 941, indicate that the majority so held.

Headnote No. 1 reads:

> **1. Trusts 91**
>
> "Constructive trust" is equitable remedy that can infer fiduciary-like relationship within transaction for purpose of promoting justice and that can be imposed on parties whose course of conduct over *long, pre-existing period* suggests that relationship of confidence and trust was assumed by parties to subject action. [Emphasis added.]

Headnote No. 17 reads:

> **17. Trusts 110**
>
> To show constructive trust under Texas law, plaintiff must *first* show, by preponderance of evidence, that parties had *longstanding* fiduciary or confidential, trusting relationship unrelated to subject transaction. [Emphasis added.]

Headnote No. 18 reads:

> **18. Trusts 103**
>
> Under Texas law, whether or not fiduciary relationship exists is question of fact, but whether relationship is sufficiently *longstanding* to support imposition of constructive trust is question of law. [Emphasis added.]

Now, however, the majority finds, contrary to the undisputed fact, that there was no prior fiduciary or confidential relationship between these parties:

> We recognize that the Texas law, in the absence of fraud, places almost controlling emphasis upon the requirement that there must be a *pre-existing* confidential relationship of trust and confidence between the parties before the dealings which give rise to a constructive trust. There was no such pre-existing relationship in this case.

Per Curiam Opinion of _____ at 4.

The district court found as a fact which was not disputed on appeal that a confidential or fiduciary relationship existed between Ward and Whatley prior to and apart from their Dyckman property dealings. On what basis the majority now can reverse that undisputed fact finding, I do not understand.

The majority also suggests that, because the Dyckman acquisition was "directly related" to the parties' prior dealings and was "not separate and independent" from those prior dealings, somehow, the pre-existing fiduciary relationship will not, under Texas law, support a constructive trust. *Ibid.* I can find no Texas case so holding. In addition, this ignores the critical, undisputed fact that Ward and Whatley did not discuss or contemplate acquiring Dyckman until months after their fiduciary relationship had been established. Moreover, the majority's current insistence that, in order to impose a constructive trust, the prior dealings must have been *"separate"* from the subject transaction is ironic in light of the requirement of Texas law that a constructive trust may *only* be imposed where the subject transaction is *within* the scope of the parties' prior dealings. *Rankin v. Naftalis,* 557 S.W.2d 940, 944 (Tex. 1977).

I am in agreement with the partial grant of appellee Ward's motion to recall the mandate since it reflects recognition of another of the errors in the original opinion to which I referred in my dissent. But the basic error of the majority holding remains uncorrected. A man who admittedly breached his fiduciary duty is still to be rewarded by receiving what now appears to be in excess of $400,000 when neither the uncontested facts nor the Texas law justify, much less require, such an unjust and inequitable result.

Having apparently abandoned its earlier effort to rewrite the Texas law, the majority now seeks to rewrite the undisputed facts of this case. For the reasons stated in my original dissenting opinion and herein, I deplore both efforts and, accordingly, again dissent.

APPENDIX F

Larry D. HARRIS, Plaintiff,

v.

SENTRY TITLE COMPANY, INC., et al., Defendants-Appellants,

v.

Travis WARD, Defendant-Appellee.

No. 82-1108.

United States Court of Appeals,
Fifth Circuit.

Sept. 26, 1983.

Rehearing and Rehearing En Banc
Denied Oct. 26, 1983.

The United States District Court for the Northern District of Texas, Robert M. Hill, J., imposed constructive trust on proceeds of real property sale and awarded majority of such proceeds to party who had provided funds for down payment for original purchase of such property, and record title holder and others appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that duration and intensity of parties' dealings were insufficient to justify imposition of constructive trust.

Reversed and rendered.

Will, District Judge, sitting by designation, dissented and filed opinion.

1. Trusts 91

"Constructive trust" is equitable remedy that can infer fiduciary-like relationship within transaction for purpose of promoting justice and that can be imposed on parties whose course of conduct over long, preexisting period suggests that relationship of confidence and trust was assumed by parties to subject action.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts 407

In interpleader action to determine proper distribution of pro-

ceeds from foreclosure sale of real property in Texas, moved from state to federal court, controlling law was that of Texas.

3. Frauds, Statute of 71

Under Texas law, contract to convey real property normally is subject to statute of frauds and requires writing in order to be enforceable. V.T.C.A., Bus. & C. § 26.-01.

4. Trusts 17(1)

Under Texas law, creation of most trusts requires written instrument to be effective. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

5. Trusts 91

Although under Texas law creation of most trusts requires written instrument to be effective, certain trusts can be imposed as equitable judicial remedy without formal writing; such are recognized as constructive trusts. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

6. Trusts 103(1)

Under Texas law, critical requirement for recognition of constructive trust would be that parties have confidential or fiduciary relationship prior to and apart from transaction in question.

7. Trusts 103(1)

Under Texas law, confidential or fiduciary relationship warranting recognition of constructive trust may be established through prior joint business ventures, family relationships or other types of close, confidence-inducing relationships; such relationship need not arise from strict, formal fiduciary relationship, but mere subjective confidence among business associates or the like is insufficient.

8. Trusts 1, 91

"Actual trust" is established by express will of parties, while "constructive trust" is equitable remedy based on court's interest in preventing unjust enrichment rather than on legally enforceable fiduciary relationships.

See publication Words and Phrases for other judicial constructions and definitions.

9. Trusts 91

"Constructive trust" is not fiduciary relationship, but rather equitable duty.

10. Trusts 104

Under Texas law, constructive trust arises when person holding title to property is subject to equitable duty to convey it to another on ground that he would be unjustly enriched if he were permitted to retain it; such is imposed without regard to, and even despite, intention of parties.

11. Trusts 65, 85

"Resulting trust" is actual, binding trust that can develop where parties intended confidential or fiduciary relationship to develop and acted accordingly, but failed to create valid actual trust agreement; resulting trust requires evidence of shared intent to establish strict fiduciary relationship.

See publication Words and Phrases for other judicial constructions and definitions.

12. Trusts 83

Resulting trust can occur where one party buys real property with funds of another with understanding that property is being held for party that provided money.

13. Trusts 62

Resulting-trust analysis did not apply to case where no shared intent to establish strict fiduciary relationship was claimed.

14. Trusts 92½

Doctrine of constructive trust cuts through requirements of statute of frauds or parol-evidence rule that otherwise could prevent recovery in a case.

15. Trusts 91

Under Texas law, there is no "unyielding formula" for determining whether constructive trust exists on facts of particular case.

16. Trusts 103(1)

As two general prerequisites to imposition of constructive trust, Texas case law requires prior, unrelated history of close and

trusted dealings of same general nature or scope as subject transactions and finding that unjust enrichment would result if remedy of constructive trust were not imposed.

17. Trusts 110

To show constructive trust under Texas law, plaintiff must first show, by preponderance of evidence, that parties had long-standing fiduciary or confidential, trusting relationship unrelated to subject transaction.

18. Trusts 103(1)

Under Texas law, whether or not fiduciary relationship exists is question of fact, but whether relationship is sufficiently long-standing to support imposition of constructive trust is question of law.

19. Trusts 103(1)

Under Texas law, dealings between parties were not sufficiently long-standing to support application of constructive trust where acquisition of tract at issue was part of overall scheme, of six months duration, to acquire adjoining property, dealings between parties were not prior, unrelated dealings in real property but rather were part of single master plan to acquire such adjoining property and parties had had no business dealings with each other prior to dealings in connection with such plan.

20. Trusts 103(1)

Under Texas law, six-month-old plan to acquire real property does not meet kind of ongoing, confidential relationship required to support imposition of constructive trust, no matter how intertwined parties' financial scheming might be during such period.

21. Trusts 17(3)

Without written trust agreement, arrangement to hold property on behalf of another would be unenforceable under Texas Trust Act. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

22. Frauds, Statute of 74(1)

Under Texas law, oral contract under which party would hold title to real property on behalf of another would be unenforceable under statute of frauds. V.T.C.A., Bus. & C. § 26.01.

23. Frauds, Statute of 55

Reason for statutes of frauds is to formalize dealings in land so as to avoid inexactness and possible abuses in proving oral land contracts.

24. Trusts 17(3)

Even if there were fiduciary relationship between party who purchased real property and other party who provided down payment for purchase, duty to transfer property was unenforceable under Texas Trust Act as oral trust to convey real property. Vernon's Ann.Texas Civ.St. art. 7425b-7.

25. Implied and Constructive Contracts 3

"Unjust enrichment" is equitable principle that recognizes situations where one party has received benefit at expense of innocent other person.

See publication Words and Phrases for other judicial constructions and definitions.

26. Implied and Constructive Contracts 3

Under Texas law, mere fact that one party has made profit is insufficient ground to order restitution on theory of unjust enrichment; profit must be "unjust" under principles of equity.

27. Implied and Constructive Contracts 3

In context of unjust enrichment, there is no requirement in the law that business judgment must be logical or successful, merely that there be business purpose behind decision.

28. Equity 65(1)

Ancient precept that he who comes into equity must come with clean hands is fundamental of equity jurisprudence.

29. Implied and Constructive Contracts 3

Profits, no matter how large, do not constitute unjust enrichment unless they equitably belong to another person.

30. Trusts 95

Under Texas law, retention of profits from sale of real property by party in whose name property was originally purchased would not result in unjust enrichment sufficient to establish con-

structive trust in favor of other party who provided money for down payment for such purchase.

31. Frauds, Statute of 125(1)

Verbal promises to convey real estate are unenforceable under Texas statute of frauds. V.T.C.A., Bus. & C. § 26.01.

Vetter, Bates, Tibbals, Lee & DeBusk, J. Albert Kroemer, J. Michael Tibbals, Dallas, Tex., for defendants-appellants.

Rohde, Chapman, Ford & How, Michael E. Rohde, Lawrence McDonald Wells, Dallas, Tex., for Ward.

Appeal from the United States District Court for the Northern District of Texas.

Before WILLIAMS and JOLLY, Circuit Judges, and WILL* District Judge.

JERRE S. WILLIAMS, Circuit Judge:

This appeal is an interpleader action to determine the proper distribution of proceeds from a foreclosure sale of real property in Henderson County, Texas. The case was moved from state to federal court when the IRS asserted a claim against the proceeds, 28 U.S.C. §§ 1340, 1345, and remained there after the IRS achieved satisfaction of its claims. The district court imposed a constructive trust on the proceeds in favor of defendant-appellee Travis Ward and awarded the majority of the funds to Ward, rather than to defendant-appellant Sentry Title Company or its controlling shareholder, Alan Whatley. We find that the facts do not support the imposition of a constructive trust under Texas law and reverse the district court.

I. *Facts*

Travis Ward is a successful business and oil man in Athens, Texas. In early 1970, Ward was interested in acquiring a 490 acre tract near Cedar Creek Lake in Henderson County, Texas. The owner of the property was the Tarrant County, Texas, Water Control Board. Fearing that the price would go up if he used his own name, Ward did not want to bid for the property personally. He therefore approached Alan Whatley, a local

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*District Judge of the Northern District of Illinois, sitting by designation.

businessman who knew some members of the Water Board. Ward met in early 1970 with Whatley and Bill Hart, Whatley's attorney. Whatley and Hart agreed to help Ward submit a bid for the 490 acres. In return, Hart was to receive $30,000 to $35,000 if Ward acquired the 490 acres through these efforts. Whatley's compensation for acting on behalf of Ward was that he would receive Ward's aid in financing the purchase of a 16 acre tract in Athens, Texas. Whatley had a contract to purchase the Athens tract for approximately $80,000. Ward agreed to provide Whatley with $20,800 as a down payment on the property, which the parties agreed would be held jointly by Whatley and Ward.

Ward obtained the $20,800 through the State National Bank of Corsicana, Texas, in which Ward was the majority stockholder and a bank officer. The loan was made in Whatley's name, although Ward paid the note off out of his own funds. The district court found that this note was made in Whatley's name only because the lending officer objected to making a loan in the name of a bank officer.

On July 6, 1970, after several discussions of strategy, Hart made a bid to purchase the 490 acres from the Water Board for $480,000. The district court found this bid was made on behalf of Ward. Three other bids were made on that same date. A bid of $511,000 was submitted by Ward himself through one of his holding companies, Pan American Properties, Inc. Another bid of $771,750 was submitted by Home Engineering, Inc., a company controlled by Whatley. The district court found that this bid also was made on behalf of Ward. Finally, Spanish Shores, a company unrelated to the Ward endeavors, submitted a bid for $748,230. According to the facts as found by the district court, the Ward parties had hoped that one of their bids would be the high bid, and that any of their unnecessarily high bids could be withdrawn and still allow a Ward-related bid to win the 490 acres.

The Water Board made an initial determination that the Spanish Shores bid, although seemingly lower than the Home Engineering bid, was in fact the highest bid.[1] Ward took the two

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[1]At first glance, $771,750 is larger than $748,230. However, the conditions of the bid, including the timing of payments could make a higher dollar bid inferior to a lower but less complicated offer. For example, $10,000 today is worth more than $10,500 a year from now, at current interest rates.

highest bids to an independent bank for analysis, in an attempt to show the Water Board that the $771,750 Home Engineering bid was in fact higher than the $748,230 bid. The Water Board planned to resolve the issue on July 28.

Between July 6 and 28, Ward met twice with Whatley and Hart. They decided upon additional steps that might help Ward to emerge the victor in the bid for the 490 acres. One plan involved the Dyckman tract, a property that abutted the 490 acres and possessed an easement over that land. Whatley and Hart had tried before to acquire this property. Ward advanced Hart $600 for expenses, and Hart entered into a contract to purchase the Dyckman property for $30,500. The Dyckman property was sold on about July 24 to Home Engineering, a company controlled by Whatley. The sales price was met with a $5,000 down payment that Ward apparently furnished himself, plus a promissory note for $25,500 given to the seller. The proceeds from a later sale of the Dyckman property are the subject of this appeal.

Another leg to the July strategic maneuvers was the acquisition of the Lacy lawsuit. Jack and Pauline Lacy had owned a piece of the 490 acre tract and sold it to the Water Board. Disputes later developed, and the Lacys were contemplating suit against the Water Board. Ward believed that if he held the right to pursue the Lacy suit, his chances of winning the 490 acres would be increased. Whatley acquired the rights to pursue the Lacy suit, with the assistance of Ward's attorney, Willis Moore.

When the Water Board met on July 29, 1970, it voted to reject all bids for the 490 acres and initiate new bidding with an October 15, 1971, date. This second round produced two bids, one by Sentry Title Company, Inc., a company controlled by Whatley, and the other by an unrelated company. These bids again were rejected by the Water Board, and a third round of bids took place in February of 1972. Ward did not bid in this final round because he felt the price of the 490 acres had gotten too high for him. Sentry Title, one of Whatley's companies, submitted a bid on behalf of Whatley, not on behalf of Ward, that won the property for $807,256.

Ward has not asserted any ownership interest in the 490 acres since he dropped out of the bidding. Nor has he pursued the other

related projects that grew out of the overall scheme to buy the 490 acres, such as the Lacy lawsuit or the Athens property that Ward helped Whatley to acquire. However, Ward has asserted an equitable interest in the Dyckman property that Whatley bought in July, 1970.

The status of the Dyckman tract had changed several times after Home Engineering bought it in July of 1970. First, title was transferred from Home Engineering to Sentry Title in 1972; Sentry was also controlled by Whatley at that time. Home apparently financed a second mortgage on the property to enable Sentry to buy it. The first mortgage on the property continued, but the holder of the lien, the original owner, sold the note to Bob John Robinson. When Whatley's companies fell into financial distress and defaulted on the note, Robinson called for a foreclosure sale. The property was sold at the foreclosure sale to Travis Ward for $250,000.[2]

Ward brought this interpleader action to assert a claim to the proceeds remaining from the Dyckman tract foreclosure sale.[3] Ward claimed, inter alia, that Whatley initially bought the property as Ward's agent, and that Ward therefore was entitled to any proceeds remaining for various creditors are paid. No claims were made against Whatley personally or against Whatley's other real estate holdings. The suit was filed initially in state court, but the IRS soon joined the action to assert a tax claim, and the case was removed to federal district court, 28 U.S.C. §§ 1340, 1345. When the IRS finally received satisfaction of its claims, the district court found it would be in the interest of justice to allow the case to remain in federal court rather than delay the litigation further by a remand to state court. We find no abuse of discretion in this ruling.

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[2]Ward's ultimate ownership of the Dyckman tract is unrelated to the case before us in which Ward lays claim to the proceeds of the foreclosure sale.

[3]Some claims, including certain trustee's expenses and claims of the IRS, either have been paid from this interpleader fund already or are stipulated to be superior to Ward's claim that we examine today.

The district court found that any oral partnership arrangement that might have existed among Ward, Whatley, and Hart would be unenforceable vis-a-vis the Dyckman tract under the Statute of Frauds. It similarly determined that Texas trust law would not recognize most fiduciary relationships asserted as existing between Ward and Whatley in the absence of a written agreement. However, the court did find that the facts of the case supported the imposition of a constructive trust on the transaction.

[1] A constructive trust is an equitable remedy that can be imposed on parties whose course of conduct over a long, preexisting period suggests that a relationship of confidence and trust was assumed by the parties to the subject action. The importance of a constructive trust in this case, of course, is the fact that such trusts, although involving real property, are not subject to the statute of frauds. The district court, after providing for the payoff of certain recorded liens, judgments, and attorneys fees, awarded the bulk of the $250,000 proceeds of the Dyckman tract to Ward by imposing a constructive trust upon the proceeds.

Whatley brings this timely appeal, asking us to overturn the imposition of a constructive trust.

II. *Constructive Trusts—Generally*

[2-5] The controlling law is that of Texas. Under Texas law, a contract to convey real property normally is subject to the statute of frauds and requires a writing in order to be enforceable. Tex.Bus. & Com. Code Ann. § 26.01 (Vernon 1968). Similarly, the creation of most trusts requires a written instrument to be effective. Texas Trust Act, Tex.Rev.Civ.Stat.Ann. art. 7425b-1 et seq. (Vernon 1960). Certain trusts, though, can be imposed as an equitable judicial remedy without a formal writing. These are recognized as constructive trusts.

A constructive trust is an equitable tool in a court's power that can infer a fiduciary-like relationship within a transaction for the purpose of promoting justice. *Gordy v. Alexander,* 550 S.W.2d 146 (Tex.Civ.App.—Amarillo 1977, writ ref'd n.r.e.). "Resort is had to it in order that a statute enacted for the purpose of preventing fraud [, the statute of frauds,] may not be used as an instrument for perpetrating or protecting a fraud." *Pope v. Garrett,* 147 Tex. 18, 23, 211 S.W.2d 559, 561 (1948).

[6, 7] In recognizing a constructive trust, the critical requirement for purposes of this case is that the parties have a confidential or fiduciary relationship prior to and apart from the transaction in question. *Rankin v. Naftalis,* 557 S.W.2d 940 (Tex. 1977); *Karnei v. Davis,* 409 S.W.2d 439 (Tex.Civ.App.—Corpus Christi 1966, no writ). This relationship may be established through prior joint business ventures, *e.g. Gaines v. Hamman,* 163 Tex. 618, 358 S.W.2d 557 (1962), family relationships, *Mills v. Gray,* 147 Tex. 33, 210 S.W.2d 985 (Tex.1948); *Ellisor v. Ellisor,* 630 S.W.2d 746 (Tex.App.—Houston [1st Dist.] 1982, no writ), or other types of close, confidence-inducing relationships. It need not arise from a strict, formal fiduciary relationship. *Meadows v. Bierschwale,* 516 S.W.2d 125, 128 (Tex.1974); *Holland v. Lesesne,* 350 S.W.2d 859 (Tex.Civ.App.—San Antonio 1961, writ ref'd n.r.e.). However, mere subjective confidence among business associates or the like is insufficient to support a constructive trust. *Consolidated Gas & Equip. Co. v. Thompson,* 405 S.W.2d 333 (Tex.1966).

[8-10] The distinction between an actual trust and a constructive trust is critical. An actual trust is established by the express will of the parties, while a constructive trust is an equitable remedy based on the court's interest in preventing unjust enrichment rather than on any legally-enforceable fiduciary relationships. A constructive trust is actually not a fiduciary relationship at all but rather an equitable duty. As explained in the Restatement of Restitution § 160, adopted by the Supreme Court of Texas in *Fitz-Gerald v. Hull,* 150 Tex. 39, 237 S.W.2d 256 (1951), a constructive trust arises when "a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." It is imposed without regard to, and even despite, the intentions of the parties.

[11-13] A constructive trust must also be distinguished from a resulting trust. A resulting trust is an actual, binding trust that can develop where the parties intended a confidential or fiduciary relationship to develop and acted accordingly, but failed to create a valid actual trust agreement. A resulting trust can occur, for example, where one party buys real property with the funds of

another with the understanding that the property is being held for the party that provided the money. The resulting trust analysis does not apply to this case, however, because it requires evidence of a shared intent to establish a strict fiduciary relationship. No shared intent to establish such a relationship is claimed in this case. The issue of resulting trust is not raised by any party.

[14, 15] The doctrine of constructive trust cuts through the requirements of the statute of frauds or the parol evidence rule that otherwise could prevent recovery in a case. *Palmer v. Fuqua,* 641 F.2d 1146, 1155 (5th Cir.1981). Yet, since this is an equitable remedy rather than a legal instrument there is no "unyielding formula" for determining whether a constructive trust exists on the facts of a particular case. *Meadows v. Bierschwale,* 516 S.W.2d 125, 131 (Tex.1974). Prior Texas cases, however, serve as important guideposts in analyzing the principal factors.

In *Consolidated Gas & Equip. Co. v. Thompson,* 405 S.W.2d 333 (Tex.1966), the Supreme Court of Texas found that the dealings between the parties failed to establish a constructive trust but showed at most either an oral contract to convey real property or an oral trust, neither of which was enforceable under the Texas Statute of Frauds or the Texas Trust Act. The case involved attempts to secure drilling rights to certain Texas oil and gas properties. The Griffiths made an agreement that they would receive a 1/16th overriding royalty from Consolidated Gas if they obtained the needed land. The Griffiths, finding that they could not secure the property in time, enlisted the aid of H.M. Thompson. They evidently promised Thompson 1/3 of their 1/16th interest. However, when Thompson obtained the rights directly for Consolidated Gas, Consolidated Gas refused to recognize any obligation to the Griffiths. The agreement between Consolidated Gas and the Griffiths was entirely oral. The Griffiths sued on a theory of constructive trust.

The Supreme Court of Texas held that no constructive trust was created under Texas law. There had been prior business dealings and the payment of finders fees between Consolidated Gas and the Griffiths. However, the court found the nature of these contracts to be sporatic. They did not meet a requirement of dealings "over a long period of time, [where] the parties had worked together for the joint acquisition and development of property

previous to the particular agreement sought to be enforced." 405 S.W.2d at 337. Stating that there was no prior fiduciary relationship between the parties, the court refused to invoke the remedy of a constructive trust. The court found that the Griffiths acquiesced in the oral nature of the agreement for the simple reason that they trusted the Consolidated Gas official. However, the court recognized "the fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a constructive trust. To hold otherwise would render the Statute of Frauds meaningless." *Id.* at 336.

Again in *Rankin v. Naftalis,* 557 S.W.2d 940 (Tex.1977), the Supreme Court of Texas refused to impose a constructive trust on oil and gas lease transactions. The court noted that the parties had been involved in a joint venture. It also recognized that confidential relationships such as partnerships could impose a broader reach for a constructive trust than simple business dealings. However, the court found that the transactions in question were not based upon the joint venture between the parties. It refused to extend a fiduciary duty to cover the business dealings, saying: "[s]ubjective business trust, cordiality and the trust which prevails between businessmen which is the foundation of ordinary contract law" could not be a basis for imposing a trust that would thwart the statute of frauds. 557 S.W.2d at 944.

In *Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), a pipeline contractor entered into an oral joint venture agreement with another contractor to bid on a major job. When the other contractor backed out of the joint venture, Panama-Williams brought suit seeking, inter alia, imposition of a constructive trust. The trial court gave summary judgment to the defendant, but the appellate court reversed and remanded for trial.

The appellate court recognized that a constructive trust requires "actual fraud or strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer." 576 S.W.2d at 432. The court was unwilling to find a prior fiduciary business relationship because the only business relationship was that of the joint venture made the subject of

the suit. Since the business dealings were no more long-lived than the contract in question, the court refused to find a constructive trust on that ground.

However, the court then considered the long-standing friendship between Panama Shiflett, one of the principals of Panama-Williams, and defendant Lipsey. The court found a long-standing personal relationship apart from the business dealings that influenced the scope of their business contacts. It held that the requisite fiduciary relationship could be satisfied on the basis of moral, social, domestic, or personal relationships. It did not, however, change the established Texas requirement that a claim of such a prior relationship demands strict proof in order to defeat the workings of the statute of frauds. *Id.* at 432-33.

[16] In sum, then, the Texas case law imposes two general prerequisites to the impositon of a constructive trust. The first is a prior, unrelated history of close and trusted dealings of the same general nature or scope as the subject transactions. The second is a finding that unjust enrichment would result if the remedy of constructive trust were not imposed. It is to these two inquiries that we now turn.

III. *Constructive Trust—Principles Applied*

A. Prior history of unrelated dealings.

[17-20] To show a constructive trust, a plaintiff must first show, by a preponderance of the evidence, *Putaturo v. Crook*, 653 F.2d 1027 (5th Cir.1981), that the parties had a long-standing fiduciary or confidential, trusting relationship unrelated to the subject transaction. *E.g., Panama-Williams, Inc. v. Lipsey*, 576 S.W.2d 426, 432 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand*, 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Tyra v. Woodson*, 495 S.W.2d 211 (Tex.1973). Whether or not a fiduciary relationship exists is a question of fact, *Smith v. Bolin*, 153 Tex. 486, 271 S.W.2d 93, 97 (1954), but whether a relationship is sufficiently long-standing to support imposition of a constructive trust is a question of law. *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 263 (1951). We find as a matter of law that the dealings between Ward and Whatley in this case were not sufficiently longstanding to support the district court's application of a constructive trust.

First, it is clear from the undisputed evidence that the acquisition of the Dyckman tract was part of the overall scheme to acquire the 490 acres. It is of compelling significance in this case that the dealings between Ward and Whatley were not prior, unrelated dealings in real property. Rather, they were all part of a single master plan to acquire the 490 acres. Ward and Whatley had had no business dealings with each other prior to the arrangements to acquire the 490 acres. The findings of the district court confirm that the confidential relationship between Whatley and Ward first arose when Ward became interested in the 490 acres, and that "the agreement to buy the Dyckman property was clearly within the scope of that prior agreement and made in furtherance of the prior agreement." Under such a view, it was clearly erroneous for the district court to suggest that there was any confidential or fiduciary relationship between the two parties before the overall scheme developed. *See Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426, 432 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (contemporaneous business agreements cannot support imposition of a constructive trust). The evidence in this case cannot satisfy the requisite history of prior relationships. *See* Note, *Imposition of a Constructive Trust Based Upon a Breach of a Fiduciary Duty in Joint Venture Situations,* 21 S.Tex.L.J. 229, 232-36 (1981).

Even if the Dyckman tract transaction were independent and not part of the single, overall plan to acquire the 490 acres, it would still be erroneous to create a constructive trust. Ward and Whatley discussed business for the first time in early 1970, their first meeting over the 490 acres. Their plan to acquire the Dyckman tract began in July, 1970, less than six months later. Admittedly, there were several meetings, guarantees of loans, transfers of property, and cash payments flowing between the parties during the first months of 1970. However, no matter how intertwined the parties' financial scheming might have been during that period, a six month old plan to acquire properties does not meet the kind of ongoing, confidential relationship required under Texas law to support imposition of a constructive trust. *See Tyra v. Woodson,* 495 S.W.2d 211 (Tex.1973) (business relationships

from June to October insufficient to support imposition of constructive trust). *Cf. Meadows v. Bierschwale,* 516 S.W.2d 125 (Tex.1974) (constructive trust may not require long-standing relationship where fraud is proven). Even if one were to count the additional time during which Whatley's companies held the tract, it would be difficult on the facts of this case to find a long-lasting, independent relationship between Ward and Whatley or his companies.

The district court found as a fact that Whatley acquired the Dyckman tract on behalf of Ward and with the understanding that it would be transferred to Ward. It is unclear if this finding actually is meant to cover the situation where the overall attempt to obtain the 490 acres failed. Ward, indeed, was calling the shots in mid-1970 as part of the general scheme to get the 490 acres. Ward also provided the down payment money with which Whatley bought the Dyckman tract. The district court recognized that many of the dealings between Ward and Whatley appeared to be interdependent. Most businessmen, for example, would not provide a $20,800 down payment on real estate to a virtual stranger, as Ward did for Whatley and the Athens property dealings, without some hope of personal gain.

[21-24] Whatley's own company name, however, was on the Dyckman tract deed and the mortgage. Whatley's firm, not Ward, made the mortgage payments and managed the Dyckman property, at least until the firm became insolvent.[4] We accept, nonetheless, the finding of the district court that there was an oral contract under which Whatley would hold the title to the Dyckman tract on behalf of Ward. Yet such an agreement is unenforceable under the statute of frauds for the very reason we have statutes of frauds: to formalize dealings in land so as to avoid the inexactness and possible abuses in proving oral land contracts.

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[4]It is not clear that Whatley was intending his management of the Dyckman tract to be at his own expense. On April 21, 1971, notably, Whatley sent Ward a bill for expenses in connection with their land transctions. It was not until April, 1972 that Whatley first mentioned to Ward that he considered himself, not Ward, the beneficial owner of the Dyckman tract. This conversation, in the words of the district court, led to a "physical altercation over the status of their relationship." Soon thereafter, on May 16, 1972, Ward sent Whatley

Even adding the additional finding of the district court that there was a fiduciary relationship between the two, we conclude that the duty to transfer the property is still unenforceable under the Texas Trust Act as an oral trust to convey real property. Tex.Rev.Civ.Stat.Ann. art. 7425b-7 (Vernon 1960). The business dealings between Ward and Whatley, whatever their nature, were not of sufficient duration or intensity to justify the imposition of a constructive trust. The first of the two requirements to establish a constructive trust was not met.

B. Unjust Enrichment.

The other requirement for imposition of a constructive trust is that the court's failure to intervene must cause unjust enrichment. We find this second element required to establish a constructive trust also is lacking.

[25, 26] Unjust enrichment is an equitable principle that recognizes situations where one party has received benefit at the expense of an innocent other person. The mere fact that one party has made a profit, though, is an insufficient ground to order restitution on a theory of unjust enrichment. The profit must be "unjust" under principles of equity. *See Pope v. Garrett,* 147 Tex. 18, 211 S.W.2d 559 (1948). *See generally* Restatement of Restitution § 1; 66 Am.Jur.2d Restitution and Implied Contracts § 3.

[27, 28] In the case before us, Ward was involved in covert discussions to acquire the 490 acres by rigging the bidding and without letting the Water Board know the true identity of the

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[4]*Cont'd.*

a check for the expenses listed on the April, 1971 bill. Whatley rejected Ward's check.

We do not know if the items listed on the April, 1971 bill were meant to cover all property management expenses related to the Dyckman property. Yet even if they were, this would represent nothing more than Whatley's belief at that time that he was holding the Dyckman property on behalf of Ward. Without a written trust agreement, such an arrangement would be unenforceable under the Texas Trust Act. The exception to this general rule known as "resulting trust" is not raised in this case, and this decision finds the "constructive trust" exception inapplicable.

bidder. The fact that the bidding for the 490 acres and the other tracts was made in the name of other persons was not due to any mistake, duress, or fraud. Ward was a sophisticated businessman who felt a compulsion to keep his name out of the dealings to the extent possible.[5] His decision to allow Whatley to purchase the Dyckman tract was not an oversight but an intentional business strategy. Ward may have subjectively trusted Whatley to transfer the property to him, but his failure to reduce that subjective trust to a written agreement was due to business strategy and not an equitable wrong. It is also questionable whether Ward's concealments and schemes in this deal generally leave him with the requisite "clean hands" for equitable relief.[6]

It is true that leaving the status quo undisturbed in this case will leave Whatley's company with the bulk of the $250,000 proceeds from the foreclosure sale of the Dyckman property. The tract was acquired for $30,500 during the attempt to purchase the 490 acres. Thus, it is clear that Whatley or his companies will realize a large profit from a small financial commitment. Ward points to this gain as evidence of unjust enrichment. He shows that he provided the $5,000 down payment on the property and was expecting to get title to the property in return. He

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[5]The bidding on the 490 acres was done on a blind basis. It is difficult to see how the appearance of Ward's name on the bids would influence a blind bidding scheme run by a public agency and open to the general public. However, the Water Board was not forced to accept any of the blind bids and in fact rejected the first two rounds of bidding. Ward might have held a valid belief that the presence of his name would influence the Water Board. There is, however, no requirement in the law that business judgment must be logical or sucessful, merely that there be a business purpose behind the decision.

[6]At the core of Ward's dealings with Whatley was Ward's desire to conceal his own identity from the Water Board. As part of this plan, he submitted multiple bids in different names for the same land. The district court found that his intent was to manipulate the bidding for the 490 acres and obtain the land at an advantageous price. Whether the total scheme would establish a legal offense, such as fraudulent concealment, is not before us today. However, even if the other requirements of a constructive trust were met on the facts before us, it is possible that Ward would still fail in his claims, under the ancient precept that he who comes into equity must come with clean hands, — a "fundamental of equity jurisprudence." 27 Am.Jur.2d Equity § 136, at 666-67.

feels that he, not Whatley, is entitled to the bulk of the almost ten-fold increase in the value of the Dyckman property.

[29, 30] The profit from the Dyckman property is certainly enrichment, but Ward misconstrues the meaning of the term unjust enrichment. Profits, no matter how large, do not constitute unjust enrichment unless they equitably belong to another person. *See* Restatement of Restitution § 1; 27 Am.Jur.2d Equity § 63; 66 Am.Jur.2d Restitution and Implied Contracts §§ 4-10. Ward might have provided the down payment for the Dyckman tract, but Whatley's companies made the mortgage payments and managed the property until struck by insolvency. This is not a case where one person used the funds of another for the sole purpose of acquiring property for that other person. Rather, Ward provided the down payment in the hope that the overall scheme to buy the 490 acres would bear fruit. The scheme, however, ended in abject failure. The necessary conclusion is that while there may be enrichment (profit), there has been no *unjust* enrichment in this case. This conclusion also compels the holding that the doctrine of constructive trust is inapplicable.

[31] In summary, Ward's claim for recognition of a constructive trust would fail even if he established one of the requirements but not the other. Ward, however, fails to establish either of the two requirements that would justify a constructive trust. Ward is left asserting his subjective confidence in his verbal dealings with Whatley. Verbal promises to convey real estate are unenforceable under the statute of frauds.

IV. *Conclusion*

We find that the district court erred in finding a pre-existing confidential relationship between Ward, Whatley, and Hart prior to and separate from the Dyckman tract transactions. In addition, the court erred in ruling that Whatley and his companies would be unjustly enriched at Ward's expense if allowed to recover the proceeds of the Dyckman tract foreclosure sale. We therefore hold that it was improper to impose a constructive trust between Ward and Whatley. We do not disturb the portions of the judgment awarding certain sums such as outstanding judgments and attorneys' fees to other parties originally involv-

ed in this litigation. Those portions of the judgment were not before us.[7] We reverse that part of the judgment awarding the remainder of the interpleader fund to Ward and render judgment for that amount to Sentry Title Co., Inc., record title holder of the Dyckman property at the time of the foreclosure sale.

REVERSED and RENDERED.

WILL, District Judge, dissenting:

The majority's opinion, which reverses the decision of the District Judge who heard the evidence in this case, has the unfortunate effect of rewarding, to the tune of more than $250,000,[1] appellant Alan D. Whatley (Whatley) who made little or no investment in the nine acre tract known as the Dyckman property but who asserts beneficial ownership of that property, in an admitted breach of his fiduciary obligation to appellee Travis Ward (Ward), and in what is known in the vernacular as a "double cross." Texas law, which is controlling here, does not require this, to me, inequitable and anomalous result.

The majority reaches its conclusion by straining the Texas precedents and, I believe, providing a new statement of Texas law, in contravention of what I understand to be the limited role of federal courts in applying state law. *See Erie Railroad Co.*

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[7]The rights of several claimants were settled before the district court entered its final judgment and order. These include those of the IRS and certain lien creditors. The final judgment of the district court ruled that two parties had first rights to recover from the fund. The first was J. Lawson Goggans, the attorney for Dyckman with respect to Dyckman's efforts to collect on the Dyckman tract mortgage. Goggans may recover attorneys' fees and costs of action from the interpleader fund. The second was Larry D. Harris, who acted as substitute trustee with respect to the foreclosure sale of the Dyckman tract. Harris may also recover attorneys' fees and costs of action from the interpleader fund. Whatley and Home Engineering should recover costs of action from Ward. All other parties shall bear their own costs. The remainder of the interpleader fund shall be awarded to Sentry Title Company, Inc., record title holder of the Dyckman property at the time of the foreclosure sale.

[1]At oral argument, counsel advised that the interpleaded fund here involved, as a result of interest earned thereon, now exceeds $250,000 although the exact amount was not specified.

v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). By reversing the decision of the District Court, which the majority opinion recognizes is not clearly erroneous, the majority also exceeds, I believe, the limitations normally respected and applied by appellate courts in reviewing trial court decisions. *See* Fed.R.Civ.P. 52(a); *Bryan v. Kershaw,* 366 F.2d 497, 499 (5th Cir.1966), *cert. denied,* 386 U.S. 959, 87 S.Ct. 1030, 18 L.Ed.2d 108 (1967); *Williamson v. Brown,* 646 F.2d 196, 200 (5th Cir.1981).

The District Court's findings of fact are not challenged in this appeal. In its effort to force this case into the mold of *Consolidated Gas & Equipment Co. v. Thompson,* 405 S.W.2d 333 (Tex.1966), the majority opinion overlooks some of those facts and glosses over others in footnotes. I, therefore, undertake my own recitation of the significant facts of the case. The following narration is taken from the District Court's uncontested findings as well as from other undisputed facts.

I. THE FACTS

This interpleader action arises out of a series of transactions commencing with two or three meetings in January, February or March of 1970 between Ward and Whatley to discuss possible prospective real estate purchases. Ward, a successful business and oil man in Athens, Texas, had long been interested in acquiring some real estate in the Cedar Creek Lake area of Henderson County, Texas, 490 acres of which were owned by the Tarrant County Water Control and Improvement District Number One (Water Board). Whatley was a successful land developer in the area around Henderson County. Since the 1960's, Ward had been acquainted with, and on occasion represented by, one William F. Hart (Hart), an attorney and former Henderson County Judge. Ward and Hart and Ward and Whatley had conversed in 1969 about a $50,000 loan from the State National Bank (State National), in Corsicana, Texas, of which Ward was Chairman of the Board. The loan, which fell through, was intended to be used by a 50-50 partnership of Hart and Whatley to purchase property along Cedar Creek Lake.

The next time Ward and Whatley met was in early 1970. One of the subjects discussed at that time was the 490 acre tract own-

ed by the Water Board. On January 30, 1970, Whatley made the first of a number of offers or bids to the Water Board for the 490 acre tract.

At some of the Ward-Whatley meetings, Hart, who was acting as Whatley's attorney, and Ward's attorney Willis Moore (Moore) were also present. They discussed, among other things, the possibility of Ward's acquiring the 490 acres and the acquisition by one or the other or jointly of other properties including 16 acres in downtown Athens, Texas known as the LaRue tract and 9 acres adjoining the 490 acre tract. The 9 acres were known as the Dyckman property and possesed an easement over the 490 acres owned by the Water Board.

As one result of these conversations, Home Engineering, Inc. (Home) owned by Whatley, received the proceeds of a loan in the amount of $20,800 from State National on Ward's oral assurances that he would pay the note himself and the bank would get its money back. That money was used by Whatley in the acquisition on April 2, 1970 of the LaRue property in Athens, the total purchase price of which was approximately $80,000. The loan was made in the name of Home and guaranteed by Ward, though all understood that Ward would pay it, since Ward was an officer and the principal stockholder of State National. Ward obtained a renewal of that loan on October 8, 1970 and ultimately did pay it off. The LaRue property was later conveyed without Ward's knowledge by Home to A.D.W. Enterprises (ADW), another Whatley-owned company, which later conveyed it to Computer Land Title, Inc. (Computer), another Whatley company. The deed of conveyance from Home to ADW was not recorded until some eight months after its purported date.

The District Court found that during the conversations in early 1970, Whatley and Hart agreed to help Ward submit a bid on the 490 acres in return for which Hart was to receive $30,000 to $35,000 if Ward obtained the tract and Whatley was to be compensated by Ward's paying off the $20,800 loan to Home, which he ultimately did. For various reasons, including Ward's fear that the price would go up if his interest was disclosed, it was proposed to make the bids on the 490 acres in other persons' names.

Accordingly, on July 6, 1970, a bid of $480,000 for the 490

acres was submitted to the Water Board by Hart for Ward as the undisclosed principal. Also on July 6, Ward submitted a bid of $511,000 in the name of one of his own companies, Pan American Properties, and Home submitted a bid of $771,750 also for Ward as the undisclosed principal. The plan was that, if Pan American Properties' bid was the second highest, Home would withdraw its bid. If no other bids were received, presumably both Home and Pan American would withdraw their bids. The plan failed when a fourth bid of $748,230 was also submitted on July 6 which the Water Board determined to be the most advantageous to it of the four bids submitted.

Between July 6 and July 28, 1970, Ward, Whatley and Hart had two meetings at which they discussed the possibility for tactical purposes of acquiring the Dyckman property with its easement over the 490 acre tract. Whatley and Hart had earlier entered into negotiations with Dyckman to purchase the 9 acres. About July 24, Home acquired the Dyckman property for $30,500 with a down payment of $5,000 provided by Ward and a promissory note executed by Home in the amount of $25,500 and secured only by a vendor's lien and deed of trust on the property. Ward also gave Hart $600 to pay for travel expenses in connection with the acquisition of the Dyckman property.

Hart flew to Canada to meet with Dyckman and took with him a cashier's check for the $5,000 arranged for by Ward. Whatley later contended that the $5,000 was a loan which he repaid on November 16, 1970 by conveying, at Ward's request, a lake lot he owned worth between $4750 and $6500 to Ward's friend, M.O. Atterbury. Ward denied that the $5,000 was a loan or that the transfer to Atterbury was its repayment. The District Court which heard the evidence found that Home through Hart had acquired the Dyckman property on behalf of Ward and that the conveyance to Atterbury was not in repayment of the $5,000.

At about the same time, June-July 1970, Ward, Whatley and Hart agreed that they would attempt, also for tactical purposes, to acquire a possible lawsuit against the Water Board with respect to 29 of the 490 acres which the Water Board had purchased from Jack and Pauline Lacy (the Lacys). The objective was to enhance their efforts to acquire the 490 acres for Ward. The theory of the lawsuit was that the Lacys were entitled to a reversion of ti-

tle to the 29 acres because of certain alleged misrepresentations made to them by the Water Board at the time of condemnation. Ward, Whatley and Hart agreed that the Lacys should be offered $10,000 payable when and if the suit was won plus any amounts they had to repay the Water Board for the reversion. Ward was to and did pay all expenses in connection with the suit.

In August 1970, Whatley acquired the right to file the suit in the Lacys' name and Moore, Ward's attorney filed it. Later, another attorney was retained and also paid by Ward to assist Moore in prosecuting the suit. In June 1971, Moore and Ward attempted unsuccessfully to negotiate a settlement of the suit as part of Ward's acquisition of the 490 acres.

At the July 29, 1970, meeting of the Water Board, all the July 6 bids for the 490 acres were rejected and new bids were set to be received some fifteen months later on October 15, 1971. On that date, two bids were submitted. One, by Whatley, with Sentry as the nominal bidder, was for $750,000. The second bid was for $801,150. Both were rejected and on February 10, 1972 yet another set of bids was taken by the Water Board and three bids were received. Sentry's bid of $807,256 was high and the property was sold to Sentry on May 25, 1972. Sentry both on October 15, 1971 and on February 10, 1972 was bidding for Whatley and not for Ward. Ward did not bid at either date on the 490 acres because he believed the price sought by the Water Board was too high.

In April 1972, twenty-one months after its acquisition by Hart for Ward in Home's name, Whatley for the first time advised Ward that he did not recognize that Ward had any interest in the Dyckman property which had been acquired on July 24, 1970, and later conveyed by Home to Sentry after the latter was organized. Prior to April 1972, Ward had not been aware that Home and Whatley were claiming any interest in the Dyckman property adverse to his. In fact, a year earlier on April 21, 1971, Whatley had sent Ward a bill for expenses he had incurred in connection with both the LaRue (Athens) and Dyckman properties, including the first interest payment on the $25,500 note, presumably on the premise that the expenses had been incurred for Ward's benefit as the beneficial owner. *See* District Court Findings of Fact # 27.

At Moore's instigation, Ward, Whatley, Moore and Hart met some time after Whatley, in April 1972, advised Ward that he did not recognize any interest of Ward in the Dyckman property. At that meeting, Ward and Whatley came to blows and no agreement was reached. On May 16, 1972, Ward sent Whatley a check for $18,672.50 to cover all past and future interest payments and other expenditures which Whatley would make on the Dyckman property. *See* Tr. 175-78. Whatley returned the check.

In August 1972, Ward filed suit in Henderson County against Whatley, Home, and Community Engineering, Inc. (Community), another Whatley company, asserting an equitable claim to the Dyckman property. Later he joined Sentry, to whom Home had conveyed the property, as a defendant.Sentry defaulted in that action, Ward nonsuited the other defendants and obtained a default judgment against Sentry which became final. He then immediately refiled against the other defendants. At the time Home conveyed the Dyckman property to Sentry, January 22, 1973, Ward's suit was on file and constituted notice to Sentry of his claim to an interest in the property.

Subsequently, in 1973, when Ward learned that Home had conveyed the Dyckman property to Sentry and that Dyckman was about to foreclose his vendor's lien and trust deed since payments on the note were in default, at Moore's suggestion, Ward agreed to purchase the $25,500 Dyckman note. Moore was concerned that a bona fide purchaser might defeat Ward's equitable claim to the property being asserted in the pending lawsuit. Ward and Moore arranged for one John Bob Robinson (Robinson) to attempt to acquire the note from Dyckman. Robinson did so and subsequently assigned the note to Ward. Ward's recollection was that he, through Robinson, paid Dyckman some $38,000 for the note which had a provision for increase in principal to reflect changes in the Consumer Price Index. *See* Sentry Exh. # 5.

At the foreclosure sale, Moore bid $250,000 for the Dyckman tract on behalf of Ward and obtained a Substitute Trustee's Deed to the property. It is the entitlement to the net proceeds of that transaction which is the subject matter of this lawsuit.

As indicated, this is an interpleader action brought originally

by Larry D. Harris (Harris), the trustee under the foreclosed Deed of Trust and the holder of the proceeds of the sale of the Dyckman property. Harris sought a determination of the owner of the net proceeds of the $250,000 from the foreclosure sale at which Moore on behalf of Ward bought the property. The proceeds were placed in the registry of the court. After allowing claims of the IRS for taxes and attorneys' and trustee's fees, the District Court entered Findings of Fact and Conclusions of Law awarding the net proceeds to Ward. It is from that award that Sentry, Home and Whatley appeal.

II. THE LAW

Several basic questions of Texas law are here involved. The Texas Statute of Frauds, Tex.Bus. & Com.Code Ann. sec. 26.01 (Vernon 1968), provides in relevant part that no action shall be brought in any court upon a contract for the sale of real estate or the lease thereof for a term longer than one year unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged. And the Texas Trust Act, Tex.Rev.Civ.Stat.Ann. art. 7425b-1, *et seq*. (Vernon 1960) provides in relevant part that no trust in relation to or consisting of real property shall be valid unless created, established or declared by a written instrument subscribed to by the trustor or by his agent duly authorized in writing. The Trust Act, however, specifically provides that it does not apply to a constructive or resulting trust.

The District Court determined that a constructive trust existed between Ward and Whatley as to the Dyckman property. It held that Ward had established by a preponderance of the evidence, as required by *Putaturo v. Crook*, 653 F.2d 1027, 1029 (5th Cir.1981), that a confidential or fiduciary relationship existed beteen him and Whatley prior to and apart from their Dyckman property dealings, *see Consolidated Gas & Equipment Co. v. Thompson, supra*, 405 S.W.2d at 337, and that the agreement sued upon was within the scope of their prior dealings, as required by *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex.1977). The Court also found that it would be inequitable to permit Whatley to retain the proceeds from the sale of the Dyckman property and that, even absent a written agreement, a confiden-

tial or fiduciary relationship could arise from a purely personal or informal relationship where trust and confidence had been reposed by the parties by reason of that relationship. The Court did not discuss whether the facts here gave rise to a resulting trust, presumably because it was satisfied that they did establish a constructive trust.

The trial court found that the fiduciary relationship existed between the parties here, prior to and apart from any agreement with respect to the Dyckman property, when Whatley and Hart agreed in early 1970 to assist Ward in acquiring the 490 acres for which assistance Ward was to pay Hart $30,000-$35,000 and to pay the $20,800 loan of Home at State National which Whatley had used to acquire the LaRue (Athens) property. The trial court held further that the relationship extended to all the other ventures, such as the Lacys' lawsuit and the placing of bids with the Water Board, in which the parties joined and which were related to their efforts under the agreement to assist Ward in acquiring the 490 acres, and that to allow Whatley and Sentry any interest in the proceeds of the sale of the Dyckman property would unjustly enrich them.

Accordingly, the District Court found that Home and Whatley, as its owner, had acted in a fiduciary capacity in the acquisition of the Dyckman tract (the successful negotiations were actually conducted by Hart), and that therefore Home and subsequently Sentry held title to the property in constructive trust for Ward. Whatley's refusal in April 1972 to have Home transfer title to Ward was, accordingly, a breach of that fiduciary relationship and the constructive trust.[2]

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[2]The majority suggests that it is unclear if the District Court finding that Whatley was obligated to transfer the Dyckman property to Ward was meant to cover the situation where the efforts to obtain the 490 acres for Ward failed. The District Judge made his finding more than ten years after Ward abandoned his interest in the 490 acres. Based in part on that finding, he found that Whatley had breached his fiduciary duty to Ward in asserting a beneficial interest in the Dyckman property and refusing to convey it to Ward. I find no ambiguity in the trial judge's finding. Whatley acquired the Dyckman tract with Ward's money for his benefit and with the understanding that he was holding it for Ward regardless of what happened to the 490 acres. If Ward acquired the 490 acres or not, Whatley had no equitable right to the Dyckman property and until Spril of 1972 he claimed none.

Since it is undisputed that none of the understandings between the parties were in writing, the only question to be resolved is whether the trial court properly found that, under all the facts, a constructive trust was created or, alternatively, a resulting trust was created, or whether all that existed was an oral contract to convey real estate which is unenforceable under the Statute of Frauds or an oral trust with respect to real estate which is unenforceable under the Texas Trust Act.

As the majority recognizes, the Texas Supreme Court has recently emphasized that there is no "unyielding formula" for determining whether a constructive trust should be decreed and that the facts of each individual case must determine the appropriate relief. *Meadows v. Bierschwale,* 516 S.W.2d 125, 131 (Tex.1974). That a court of equity should respond flexibly to the facts before it, applying broad, general principles of fairness, is no recent innovation in the long development of the Texas law of constructive trusts. *See also, e.g., MacDonald v. Follett,* 142 Tex. 616, 180 S.W.2d 334, 337 (1944) ("[n]o rules can be prescribed and no attempt should be made to formulate rules for the measurement of conduct by courts of equity"); *Pope v. Garrett,* 147 Tex. 18, 211 S.W.2d 559 (1948); *Fitz-Gerald v. Hull,* 150 Tex. 39, 237 S.W.2d 256, 260-62 (1951); *Gaines v. Hamman,* 163 Tex. 618, 358 S.W.2d 557, 560 (1962) (quoting *MacDonald v. Follett, supra); Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426, 432 (Tex.Civ.App. 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.1981). *And see also Gertner v. Hospital Affiliates International, Inc.,* 602 F.2d 685, 687 (5th Cir.1979). And consistent with this view of the broad, flexible posture of equity in imposing the constructive trust remedy, the Texas Supreme Court in *Fitz-Gerald v. Hull, supra,* long ago adopted the definition of constructive trust contained in the Restatement of Restitution sec. 160, as follows:

> Where a person holding title to property is subject to an equitable duty to convey it to another *on the ground that he would be unjustly enriched if he were permitted to retain it,* a constructive trust arises. [Emphasis added.]

Moreover, it is also a firmly established principle of the Texas law of constructive trusts, which neither the majority nor the appellants dispute, that the "fiduciary" or "confidential" relation-

ship necessary to give rise to "an equitable duty to convey" is a correspondingly flexible concept not subject to or governed by any set of technical prerequisites such as those necessary for a finding of partnership or joint venture. *See, e.g., Gaines v. Hamman, supra,* 358 S.W.2d at 560-61; *Cartwright v. Minton,* 318 S.W.2d 449, 453 (Tex.Civ.App.1958); *Omohundro v. Matthews,* 161 Tex. 367, 341 S.W.2d 401, 407-09 [1960]; *Smith v. Bolin,* 153 Tex. 486, 271 S.W.2d 93, 97 (1954); *Fitz-Gerald v. Hull, supra,* 237 S.W.2d at 261.

Although there may be a question of fact, *Smith v. Bolin, supra,* 271 S.W.2d at 97, whether the circumstances of a particular case warrant the finding that justifiable trust and confidence were reposed in the one against whom a constructive trust is sought to be decreed, *see Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex.1962), I find nothing in the Texas cases to limit or qualify the Texas Court of Appeals' observation in *Cartwright v. Minton, supra,* that

> "The term 'fiduciary' is derived from the civil law. It is impossible to give a definition to the term that is comprehensive enough to cover all cases. Generally, speaking, it applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith rather than legal obligation,... The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."

318 S.W. at 453. It bears emphasis that there is no challenge to the District Court's factual finding, which is accepted by the majority, that there was a fiduciary relationship between Ward and Whatley antedating their decision to acquire the Dyckman property.

Despite the foregoing, and without citation to any supporting Texas authority, the majority concludes that Texas case law imposes two absolute prerequisites to the imposition of a constructive trust: (1) a long-standing fiduciary or confidential trusting relationship unrelated to the subject transaction *and* (2) that unjust enrichment would result if a constructive trust was not imposed. Majority Opinion at 13.

With all due respect, the majority's restatement of the Texas law in such absolute terms is not reflected in any Texas decision and has the unfortunate defect of obscuring the one certain principle of the Texas law of constructive trusts, which is repeatedly emphasized in the decisions cited above, that the cases are to be dealt with on their individual facts, applying principles of equity and fairness.

I have searched in vain for a single Texas decision that applies the two-prong test for constructive trust that the majority announces today. It is certainly true that, since the decision in *Consolidated Gas and Equipment Co. v. Thompson, supra,* many Texas courts have concluded that, absent a so-called "formal" fiduciary relationship, like that between attorney and client, a finding of constructive trust depends on the existence of a confidential or fiduciary relationship separate and apart from the transaction in issue. *See, e.g., Panama-Williams, Inc. v. Lipsey, supra,* 576 S.W.2d at 433. Accordingly, some cases deny the constructive trust remedy either on the basis of a finding that there was no relationship between the parties prior to the subject transaction, *see Tyra v. Woodson,* 495 S.W.2d 211 (Tex.1973); *Karnei v. Davis,* 409 S.W.2d 439 (Tex.Civ.App.1966); *Hawkins v. Haffa,* 469 S.W.2d 733, 739—40 (Tex.Civ.App.1971); *Linder v. Citizens State Bank of Malakoff, Texas,* 528 S.W.2d 90, 94 (Tex.Civ.App.1975); *Thomson v. Norton,* 604 S.W.2d 473, 476 (Tex.Civ.App.1980), or on the basis that, while the parties did have a prior relationship, it was not fiduciary or confidential in character, *see Gasperson v. Christie, Mitchell & Mitchell, Co.,* 418 S.W.2d 345, 356 (Tex.Civ.App.1967); *Patton v. Callaway,* 522 S.W.2d 252 (Tex.Civ.App.1975); *Marut v. Collier,* 583 S.W.2d 682, 684—85 (Tex.Civ.App.1979).

However, I do not find an absolute requirement in any of these cases that the prior relationship have been of many years' or "long" standing. And since the unchallenged finding of the District Court here is that there was a fiduciary relationship between Ward and Whatley prior to and independent of their decision to have Whatley take record title to the Dyckman property, none of these cases supports the majority's result.

Further, there is express authority in the Texas cases that the two prongs isolated by the majority are not the sole factors

governing the imposition of a constructive trust. The majority's rule does not, for example, adequately deal with *Meadows v. Bierschwale, supra,* decided by the Texas Supreme Court in 1974, which holds that the constructive trust remedy may be applied in a suit for rescission of a land conveyance even in the absence of any prior relationship between the parties where there is evidence and a finding of actual fraud in the transaction. 516 S.W.2d at 128–29. *See also Maykus v. First City Realty and Financial Corp.*, 518 S.W.2d 887, 896 (Tex.Civ.App.1974) (letter of intent provides documentary proof of the confidential relationship of a present joint venture and, for purposes of constructive trust remedy, is "equivalent" to proof of a preexisting, separate confidential relationship).

Finally, the majority's two-pronged rule implicitly assumes that certain of the older Texas Supreme Court cases, in which the constructive trust remedy was imposed without a finding of any "long-standing fiduciary or confidential, trusting relationship unrelated to the subject transaction," *see, e.g., MacDonald v. Follett, supra; Edwards v. Strong,* 147 Tex. 155, 213 S.W.2d 979 (1948); *Fitz-Gerald v. Hull, supra,* are of no continuing validity after *Consolidated Gas & Equipment Co. v. Thompson, supra.* There is no explicit Texas authority of which I am aware to support this assumption and, indeed, there is post-*Consolidated Gas* authority affirming the continued validity of the leading cases. *See, e.g., Tuck v. Miller,* 483 S.W.2d 898, 905—06 (Tex.Civ.App.1972).

The *Consolidated Gas* decision itself, the decision upon which the majority and the appellees primarily rely, contains no reference whatsoever to "unjust enrichment," the second prong of the majority's two part test[3]. Moreover, *Consolidated Gas* does not signal a radical narrowing of the availability of the constructive trust remedy in Texas. Since that decision, the Supreme Court

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[3]It is perhaps ironic, in light of the frequent statement in the Texas cases that prevention of unjust enrichment is the purpose of the constructive trust remedy, *see, e.g., Fitz-Gerald v. Hull, supra,* 237 S.W.2d at 261, that there is even an indication in at least one Texas case that prevention of unjust enrichment may, in fact, not be a prerequisite to the remedy. *See Holland v. Lesesne,* 350 S.W.2d 859, 862 – 63 (Tex.Civ.App.1961).

of Texas, *Meadows v. Bierschwale, supra,* 516 S.W.2d at 131, and this court, *Gertner v. Hospital Affiliates International, Inc.*, 602 F.2d at 687, have expressly reaffirmed that whether the constructive trust remedy is to be imposed depends on the particular facts before the court.

In *Consolidated Gas,* the Texas Supreme Court found that "the proof in this case," 405 S.W.2d at 337, failed to establish a constructive trust but showed at most either an oral contract to convey an interest in realty or an oral trust, neither of which was enforceable under the Texas Statute of Frauds or the Texas Trust Act. The facts in the case were that C.A. and D.A. Griffith (father and son—the Griffiths) orally agreed with L.B. Newman (Newman), president of Consolidated Gas & Equipment Company of America (Consolidated) to assist him in securing oil and gas leases on properties, particularly those located adjacent to producing properties.

When Newman indicated he wanted a lease on a particular property, D.A. Griffith (D.A.) found that he could not get it fast enough and enlisted the assistance of Thompson, who then worked for Consolidated. D.A. agreed to give Thompson a one-third interest in the Griffith's one-sixteenth royalty if he could obtain the lease. That agreement (between the Griffiths and Thompson) was reflected in a written document which included a reference to a "promissory agreement" on the part of Newman to give the Griffiths and Thompson a one-sixteenth override under the lease. Thompson secured the lease in the name of Consolidated.

The Texas Supreme Court found that the Statute of Frauds and the Texas Trust Act made the alleged oral agreement between the Griffiths and Newman unenforceable. In so holding, it opined, 405 S.W.2d at 336,

> The fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship.

It went on to say, "...the fact that one businessman trusts another, and relies upon his promise to carry out a contract does not create a constructive trust." Rather, "...there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit." Finally, it offered the general observation

that a fiduciary relationship between businessmen who were not joint venturers could arise "where, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced." Since it found no such relationship, the Court held that no constructive trust had been established in the particular case.

The factual and equitable differences between *Consolidated Gas* and the instant case are obvious. In the former, the Griffiths invested no money in acquiring the leases. Here, Ward furnished all the money to acquire the Dyckman property. The alleged agreement between the Griffiths and Newman related to a single lease. The dealings between Ward and Whatley related to a number of transactions, including the 490 acres owned by the Water Board, the LaRue (Athens) property, the Dyckman property and the Lacys' reversionary claim lawsuit.

With respect to each of these, Ward furnished all the cash until such time as he abandoned his interest in acquiring the 490 acres. He paid the $20,800 note, the proceeds of which Whatley used to acquire the LaRue (Athens) property. He paid the $5,000 down payment plus some $600 in Hart's travel expenses to acquire the Dyckman tract and ultimately purchased the $25,500 note which Home gave Dyckman for the balance of the purchase price. He paid all expenses in connection with the Lacys' lawsuit.

In Consolidated Gas, one of the parties Newman, was dead and the only testimony as to the oral understanding came from those seeking to establish the constructive trust. In *Consolidated Gas,* the Griffiths and Thompson sought some $16,000 in royalties under the one-sixteenth overriding royalty, a royalty based on Thompson's securing a lease at a time when he was employed by Consolidated, probably a breach of his duty to his employer. Here, Whatley seeks $250,000 for which he made no investment and for an interest to which he did not claim any entitlement until April 1972, almost two years after the acquisition of the property and one year after he had billed Ward seeking reimbursement of the money he had spent in the Dyckman transaction, an obvious acknowledgment that Ward was the beneficial owner of the property. In *Consolidated Gas,* the Court found evidence only

of a unilateral subjective trust on the part of the Griffiths, no mutual or reciprocal trust on the part of Newman.

Even assuming, which it does not, that *Consolidated Gas* imposes an absolute and inflexible requirement of a "prior and separate fiduciary relationship" and states, as an unyielding rule, that isolated business transactions fall outside the scope of the constructive trust doctrine, *see Tyra v. Woodson*, 495 S.W.2d 211 (Tex.1973), it does not follow, on this record, that Whatley should or must be awarded this undeserved windfall for his breach of trust. But neither *Consolidated Gas* nor any other Texas authority that I have found requires or even directly supports the majority's holding that "[t]he business dealings between Ward & Whatley ... were not of sufficient duration or intensity to justify the imposition of a constructive trust." Majority Opinion at 949. Indeed, review of the cases cited above—consistent with the flexible principles of equity—yields no such absolute rule and very little discussion of what "duration" in months or years or level of "intensity" of prior dealings is necessary to sustain a constructive trust.

Here, while the relationship between Ward and Whatley was not one of many years' standing, it did involve a number of distinct transactions in each of which there apparently was mutual trust and confidence. Whatley trusted Ward to pay the $20,800 Home loan from State National used by Whatley to purchase the LaRue (Athens) property and Ward paid it. Ward trusted Whatley to negotiate and obtain an assignment of the Lacys' possible claim against the Water Board which Whatley did on the understanding that Ward would pay all expenses in connection with the suit, which he did. Until such time as Ward lost interest in the 490 acre tract, Whatley submitted bids admittedly on Ward's behalf. Hart, on behalf of Ward, negotiated the acquisition of the Dyckman tract with funds provided by Ward who also paid his expenses although title was vested in Home, a Whatley company, which also executed the note and trust deed for the balance of the purchase price, a note ultimately paid by Ward.

Exactly how long the relationship between Whatley and Ward existed is not entirely clear. The original conversations took place in January, February or March of 1970. The LaRue (Athens) pro-

perty was acquired on April 2, 1970 with the proceeds of the $20,800 loan. It was a six-months note and Ward had it renewed on October 1, 1970. The record does not indicate when he paid it off but it apparently was some time in 1971. As a result of meetings in July 1970, the Dyckman property was acquired on July 24 and the assignment of the Lacys' rights to sue the Water Board in August of 1970. Bids on behalf of Ward were made by Whatley as late as July 6, 1970 and Ward and Moore attempted unsuccessfully in June of 1971 to negotiate a settlement of the Lacys' lawsuit as part of Ward's acquisition of the 490 acres. On April 21, 1971, Whatley sent Ward his bill for expenses he had incurred in connection with both the LaRue and Dyckman properties. Not until April 1972, a year later, did Whatley inform Ward that he was denying that Ward had any interest in the Dyckman property.

Depending on what facts are deemed determinative of the termination of the relationship, it would appear that it lasted at least some eighteen months until mid-1971, since Whatley was billing Ward for expenses in April of that year, Ward was still endeavoring to secure the 490 acres in June of that year and Whatley did not submit a bid for the 490 acres on his own behalf until October 1971. If one takes the date on which Whatley first told Ward he did not recognize any interest of the latter in the Dyckman property as the termination date, the relationship existed until April 1972, more than two years after its inception in early 1970.

Whatley has not challenged the District Court's Findings of Fact and there is substantial evidence to support them. They are certainly not clearly erroneous. Accordingly, we are bound to accept them. *See Bryan v. Kershaw, supra,* 366 F.2d at 499; *Williamson v. Brown, supra,* 646 F.2d at 200.

Based on those findings and applying Texas constructive trust law which involves a case-by-case analysis of all the facts and circumstances of the relationship between the parties, the trial judge found that a fiduciary relationship existed between Whatley and Ward and that a constructive trust existed with respect to the Dyckman property of which trust Ward was the beneficiary. Unless we conclude that Texas law absolutely requires a longer and more comprehensive relationship than the relationship in-

dicated by the numerous activities in which Ward and Whatley engaged over a period of eighteen to twenty-seven months, the District Court's conclusions of law are clearly correct under Texas trust law. Whatley and Ward certainly reposed mutual confidence and trust in each other with respect to a number of interrelated but distinct transactions, which confidence and trust, it should be noted, were respected and not violated in any instance by all involved except Whatley. I find nothing in the Texas cases which would compel the conclusion that Judge Hill erroneously found a constructive trust. *Cf. e.g., Sanchez v. Matthews,* 636 S.W.2d 455, 458-59 (Tex.Civ.App.1980).

Judge Hill also found that Whatley and his company, Sentry, would be unjustly enriched if they were permitted to retain the proceeds from the sale of the Dyckman property and that it would be inequitable for them to do so. Given all the facts, this is an obviously correct conclusion. With little or no investment, they would receive over $250,000. In *Fitz-Gerald, supra,* one of the leading Texas cases on constructive trusts, the Texas Supreme Court adopted the Restatement definition that a constructive trust arises when "a person holding title to property ... would be unjustly enriched if he were permitted to retain it,..." *see also Panama-Williams, Inc. v. Lipsey, supra,* 576 S.W.2d at 433.

The majority, however, inexplicably concludes that Whatley will not be unjustly enriched because Ward did not have "clean hands" in his dealings with the Water Board. Whether or not that is true, it is irrelevant. As previously pointed out, Ward faithfully carried out every commitment he made to Whatley. He paid off the $20,800 loan from State National, the proceeds of which Home used to purchase the LaRue (Athens) property. He paid all costs and expenses with respect to the Lacys' claim. He paid the purchase price for the Dyckman property, the $5,000 down payment and later purchased the $25,500 note. He even paid Hart $600 in expenses to go to Canada to negotiate the purchase of the Dyckman property.

Thus, whatever the cleanliness of Ward's hands with respect to the Water Board, it is perfectly clear that, with respect to Whatley, they were "clean." And it has long been understood both elsewhere, *see, e.g., Republic Molding Corp. v. B.W. Photo Utilities,* 319 F.2d 347,349 (9th Cir.1963), and in Texas, *see*

Omohundro v. Matthews, supra, 341 S.W.2d at 410, that the clean hands defense is only available where the plaintiff's hands have become dirtied vis-a-vis the one against whom he asserts his equitable claim. The only party with "dirty hands" here is Whatley. As the trial judge found, and the majority does not dispute, he breached his fiduciary duty to Ward. The majority is applying the "clean hands" doctrine to the wrong party.

The majority also suggests that, while they recognize Whatley clearly will be greatly enriched, he will not be unjustly enriched since Whatley's companies made the mortgage payments and managed the Dyckman property until struck by insolvency. This is ironical to say the least. Whatley billed Ward in 1971 for his expenditures on both the Dyckman and LaRue (Athens) properties and then, after changing his position and asserting beneficial ownership of the Dyckman property in 1972, refused to accept payment. It seems obvious that at the time he made the expenditures, he did so on the assumption he was making them for Ward's benefit and would be reimbursed. Any amount he is now out-of-pocket is the result of his rejection of Ward's check.

The total bill for both properties was $18,672.50. The record indicates that no more than $4,892.50 could have related to the Dyckman property surveying and interest expenses. Two hundred fifty thousand dollars is certainly unjust enrichment to a man who invested little or nothing, claimed reimbursement for what little he may have invested and then breached his fiduciary duty by belatedly claiming a beneficial interest in the property and double-crossing the man who provided all the funds in their dealings.

As an overall matter, Whatley has already received $20,800, the proceeds of the State National loan which Ward paid. The majority proposes to award him an additional sum, of more than $250,000, for a total of more than $270,000. For admittedly faithless conduct, this is rich reward.

To reverse the trial judge to achieve such a result is to me totally inexplicable. Rather than straining to find Texas law, or worse, to enunciate new Texas law, to reverse a just and equitable decision, I would assume an appellate court would seek to affirm such a decision based on undisputed findings of fact and legal

conclusions consistent therewith. Judge Hill's decision is sound in law and in equity and deserves to be affirmed.

As previously noted, resulting as well as constructive trusts are an exception to the Texas Trust Act's inhibition against oral real estate trusts. While I think the facts here clearly warrant the District Judge's finding of a constructive trust, those findings also, in my opinion, clearly establish a resulting trust. As the majority recognizes, a resulting trust arises when one party buys real property with the funds of another with the understanding that the property is being held for the party that provided the money. The majority asserts that the resulting trust analysis does not apply in this case because the evidence fails to demonstrate an intent to establish a fiduciary relationship.

The District Court found, however, that such a fiduciary relationship had been established, that Whatley or his companies had purchased and held the Dyckman property with Ward's money and for his benefit and that Whatley's refusal to convey the property to Ward was a breach of that fiduciary duty. Those uncontested findings, it seems obvious to me, establish a resulting trust. *See, e.g., ATkins v. Carson,* 467 S.W.2d 495, 500 (Tex.Civ.App.1971); *Grasty v. Wood,* 230 S.W.2d 568 (Tex.Civ.App.1950); *cf. Carson v. White,* 456 S.W.2d 212 (Tex.Civ.App.1970) (no resulting trust absent evidence of the source of the funds used to purchase the property).

The fact that Ward has not urged the resulting trust analysis or that the District Court found a constructive trust rather than a resulting trust or both does not change the facts or warrant the majority's dogged refusal to acknowledge that Texas law would impose a resulting trust on the basis of those unchallenged facts. All concerned understood that Whatley was acting in connection with the Dyckman property on behalf of Ward until 1972 when Whatley for the first time sought to deny it. Unless this Court rejects the District Court's uncontested findings, which it is my understanding an appellate court may not do, all the elements of a resulting trust are here present.

Two other matters concern me. First, while I agree with the

District Court's finding that Ward is entitled to the interpleaded funds, if equity is to be accomplished, Whatley or his companies, notwithstanding their refusal to accept Ward's check in payment thereof, are entitled to be reimbursed for any out-of-pocket expenses which they incurred with respect to the Dyckman property. Accordingly, I would remand to the trial court with instructions to enter a judgment consistent with this opinion.

Second, the record indicates that Ward purchased the $25,500 note secured by the vendor's lien and trust deed from Dyckman in 1973 prior to the foreclosure for some $38,000. The record does not indicate that he recovered that amount. This may be because, in light of the District Judge's decision, the question was moot. If Whatley is to receive the proceeds of the foreclosure sale, however, certainly Ward, as the holder of the trust deed, is entitled to recover with interest the amount he paid Dyckman. It may be that Ward has previously recovered that amount, although Whatley's trial brief indicates that Ward has not. If not, he should certainly do so now although the majority does not deal with the question.

III. CONCLUSION

Given the uncontested facts found by the District Court, my reading of Texas trust law and my understanding of the role of a federal appellate court, I would affirm, remanding only to permit appellees to be reimbursed for any out-of-pocket expenses they incurred with respect to the Dyckman property. I cannot in good conscience join in a decision which will reward perfidy and breach of trust with more than $270,000, an amount which, even in Texas, must be substantial.

APPENDIX G

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY DEVELOPMENT CORPORATION, ET AL,
DEFENDANTS

MOTION TO REMAND

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Travis Ward, a Defendant herein, and files this his Motion to Remand and would show the Court as follows:

1. On May 8, 1975 the instant cause of action was originally filed in the 191st Judicial District, Dallas County, Texas by the Plaintiff against Sentry Development Corporation, Travis Ward, Home Engineering, Inc., Alan D. Whatley, J. Lawson Goggins, Texas Engineering Associates and the Internal Revenue Service of the United States of America ("U.S.A.").

2. On June 2, 1975 Defendant U.S.A. filed its Petition for Removal Relying upon 28 U.S.C. Section 1441 and 1446. Those statutes state, in essence, that this Court was the only Court with jurisdiction to hear this suit because the U.S.A. was a party. The suit was subsequently removed to this Court.

3. On or about April 17, 1979, the U.S.A. filed its Motion to Dismiss the U.S.A. as a party to this action indicating in said Motion that its claim in the suit had been satisfied. On May 23, 1979 the U.S.A. was dismissed by order of this Court from the subject litigation.

4. The claims before this Court in this suit arise out of an interpleader action wherein the various Defendants contend they are entitled to all or a portion of the $250,000 Certificate of

Deposit being held by this Court on behalf of the successful party(ies) herein. The funds represented by the Certificate of Deposit were received from a foreclosure sale on certain real property located in the State of Texas, ownership of which property has also been disputed by certain of the parties herein.

5. Defendant, Travis Ward, would show that the sole basis for the removal in the first instance was the statutes referred to hereinabove upon which the U.S.A. bottomed its removal claim. The claim of the U.S.A. has now been satisfied and the governmental entity has been dismissed from the suit. No other separate basis of jurisdiction of this Court presently exists over the parties or the subject matter herein. No diversity of citizenship is present and the dispute lacks the existence of any federal question.

WHEREFORE, Defendant Travis Ward prays that this cause be remanded to the Judicial District Court of Dallas County, Texas from which it earlier was removed for the reason that this Court presently lacks jurisdiction over the disputes contained in the suit.

Respectfully submitted,

RHODE, CHAPMAN, FORD & HOW
Attorneys and Counselors
3500 Southland Center
Dallas, Texas 75201
Telephone: 214/744-3500

BY: _____
Ken Ford - 07226600

ATTORNEY FOR DEFENDANT
TRAVIS WARD

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Remand has been this 23rd day of March, 1981, mailed postage prepaid, Certified Mail, Return Receipt Requested to Mr. H. Dee Johnson, Jr., Eldridge, Goggans & Weiss, 3700 First International Building, Dallas, Texas

75270, Mr. J. Albert Kroemer and Mr. Manuel DeBusk, Vetter, Bates, Tibbals & Lee, 2468 One Main Place, Dallas, Texas 75250, Ms. Rosemary Lehmberg, 1203 Newning Place, Austin, Texas 78704 and Mr. Waller M. Collie, Jr., Collie, McSpedden & Roberts, 720 Fidelity Union Tower, Dallas Texas 75201.

KEN FORD

APPENDIX H

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY DEVELOPMENT CORPORATION, ET AL,
DEFENDANTS

BRIEF IN SUPPORT OF MOTION TO REMAND OF DEFENDANT TRAVIS WARD

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant Travis Ward and would show the Court the following with respect to his Motion to Remand:

1. The case at hand rests before this Court in a posture wherein there presently exists no basis of federal jurisdiction over the parties herein or their disputes and claims. The suit originally arose from a dispute over ownership and a subsequent sale of certain property located in Henderson County, Texas. Certain of the parties herein claimed varying interests in the subject property. The property was sold for the sum of $250,000, to Defendant Travis Ward which amount was by order of this Court invested in a Certificate of Deposit, and which amount is claimed in whole or in party by all the parties herein.

2. The United States of America caused the suit to be removed to this Court, relying upon 28 U.S.C. Sections 1441 and 1446. Subsequently the claim of the United States of America in the suit was satisfied, and the governmental entity was dismissed from the action by this Court.

3. Since the dismissal of the United States of America from the suit, the original basis for federal jurisdiction of the disputes amongst the parties herein no longer exists. Plaintiff's Original Petition in Interpleader makes clear on its face the fact that diversity of citizenship does not exist in the matter. All present par-

ties are Texas residents. Furthermore, the basic dispute involves questions concerning ownership of real property in the State of Texas and persons who are entitled to sales proceeds from said property, all questions better decided by a state court. Nowhere in the pleadings does a party attempt to raise what would be considered a federal question such that federal jurisdiction might exist on that basis.

4. Defendant, Travis Ward, does not take issue with the removal of this cause to this Court initially; this Defendant, however, does urge this Court to remand the case for the reason that the suit, although properly removed in the first instance, no longer is a suit over which this Court should exercise jurisdiction. The sole basis of this Court's jurisdiction at the time of removal (the presence of the United States of America as a party) no longer exists. A case analogous to the instant case is *Smith vs. Rivest,* 296 F. Supp. 379 (E.D. Wis. 1975). In the *Smith* decision the United States, appearing through substitution for a United States Postal Worker, removed the case to federal court and was subsequently successful in obtaining a Rule 12(b)(6) order as to the plaintiff's claim against it leaving present in the suit only resident defendants. The court, upon considering the motion to remand of one resident defendant, held that since resolution of the government's motion eliminated the federal facet of the case which had supported removal and thereby left only a claim or cause of action not within the original jurisdiction of the federal court, it was appropriate for the court to remand. The principle was reiterated in *Struscher vs. Perlin,* 478 F. Supp. 464 (N.D. Ill. 1979) wherein the court emphasized the fact that the relief to be afforded remaining defendants would be rooted in state law, both statutory and common, as one ground for the propriety of discretionary remand. See also *Columbia vs. Moxley,* 471. F. Supp. 777 (D.C. 1975) and *Piscotta vs. Ferrando,* 428 F. Supp. 685 (S.D. N.Y. 1977).

WHEREFORE, Defendant Travis Ward, prays that this suit be remanded to state court consistent with the relief sought in the Motion to Remand filed contemporaneously herewith.

Respectfully submitted,

TRAVIS WARD

BY: _____

RHODE, CHAPMAN, FORD & HOW
Attorneys and Counselors
3500 Southland Center
Dallas, Texas 75201
Telephone: 214/744-3500

ATTORNEY FOR DEFENDANT
TRAVIS WARD

CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Support of Motion to Remand of Defendant Travis Ward has been this 23rd day of March, 1981, mailed postage prepaid, Certified Mail, Return Receipt Requested to Mr. H. Dee Johnson, Jr., Eldridge, Goggans & Weiss, 3700 First International Building, Dallas, Texas 75270, Mr. J. Albert Kroemer and Mr. Manuel DeBusk, Vetter, Bates, Tibbals & Lee, 2468 One Main Place, Dallas, Texas 75250, Mr. Waller M. Collie, Jr., Collie, McSpedden & Roberts, 720 Fidelity Union Tower, Dallas Texas 75201 and Ms. Rosemary Lehmberg, 1203 Newning Place, Austin, Texas 78704.

_____

Ken Ford

APPENDIX I
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY DEVELOPMENT CORPORATION, ET AL,
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for hearing and trial, the Court, after having heard the evidence, considered the parties briefs and the arguments of counsel, makes the following findings of fact and conclusions of law.

Findings of Fact

1. By way of this interpleader action Larry D. Harris (Harris), plaintiff, seeks to have this court determine the ownership of $250,000 which are the proceeds from the sale at foreclosure of a 9 acre tract of land known as "the Dyckman property." This tract of land had been purchased from Stewart R. Dyckman (Dyckman) in the name of Home Engineering, Inc. (Home), defendant, which had given a Deed of Trust on the tract of land to secure a promissory note in favor of Dyckman (the Dyckman Note) with which Home purchased the Dyckman property. The Dyckman Note was sold to Bob John Robinson (Robinson). Home then defaulted on the Dyckman Note. A foreclosure sale was held under the Deed of Trust and the Dyckman property was sold to Travis Ward (Ward), defendant for $250,000. This action was then initiated by Harris, trust under the Deed of Trust, and the $250,000 (the fund) was placed in the registry of this Court subject to the claims of those asserting ownerships thereto.

2. Harris sought to recover from the fund substitute trustee's fees and attorney's fees he incurred as a result of the foreclosure sale and the filing of this action. Harris' claims were disposed of by Order of this Court filed April 23, 1981.

3. J. Lawson Goggans (Goggans), defendant, was the attorney for Dyckman with respect to Dyckman's efforts to collect the Dyckman Note. Thereafter, Goggans acted as Robinson's attorney in Robinson's effort to collect the Dyckman note. On the date of foreclosure the amount owing on the Dyckman Note was $38,855.51. Goggans claims that the Dyckman provided that ten percent (10%) of the principal and interest due would be payable as attorney's fees if the Dyckman Note was placed in the hands of an attorney for collection. Thus, Goggans seeks recovery of the sum of $3,885.55 from the fund as an attorney's fee. Goggans contends that his claim is prior and superior to that of any other defendant.

4. The claims of the Internal Revenue Service (IRS) have been fully satisfied , and the IRS was dismissed as a party to this action Order of this Court filed May 23, 1979.

5. All parties agree that the holder of the Dyckman Note is entitled to the first payment out of the remainder of the fund.

6. Ward seeks to recover the remainder of the fund on the ground that Home took title to the Dyckman property on his behalf, thereby creating an equitable title to the Dyckman property in Ward. Thus, Ward claims that the proceeds of the sale now represented by the fund belong to him.

7. Texas Engineering Associates (Texas Engineering), defendant claims that it is the holder of a recorded abstract of judgment again. Sentry Title Company, Inc. (Sentry), defendant, filed of record on December 5, 1974, in Henderson County, Texas. The judgment is in the sum of $837.53, plus attorneys' fees of $400, with interest on said amounts at the rate of ten percent (10%) per annum, plus $24 as costs action. Texas Engineering seeks recovery of this judgment out of the proceeds of the fund to which Sentry is entitled.

8. Sentry seeks to recover the remainder of the fund on the ground that it was the record title holder of the Dyckman property at the time it was sold at the foreclosure sale. Prior to the

foreclosure sale Home had deeded the Dyckman property to Sentry, but retained a lien thereon.

9. Home and Alan D. Whatley, defendant, claim the remainder of the fund through Sentry.

10. In early 1970 Ward learned that the Tarrant County Water Board (the Water Board) planned to sell 490 acres of land near Cedar Creek Lake, Henderson County, Texas (the 490 acres).

11. Ward desired to purchase the 490 acres. Whatley and Bill (Hart), Whatley's attorney and agent and also Home's attorney and agent were acquainted with several members of the Water Board and had dealt with the Water Board in the past. Ward sought Whatley's and Hart's help in submitting a bid for the 490 acres.

12. Whatley and Hart agreed to help Ward submit a bid for the 490 acres. In return (Hart) was to receive $30,000 to $35,000 if the 490 acres was acquired by Ward. Whatley was to be compensated by obtaining Ward's aid on another land transaction involving 16 acres in Athens, Texas (the Athens property). Whatley had a contract to purchase the Athens property for approximately $80,000. Ward agreed to provide Whatley $20,800 for the down payment on the Athens property, which the parties agreed was to be owned equally by Whatley and Ward.

13. In March 1970 Ward provided Whatley with $20,800 in the form of a loan from State National Bank of Corsicana, Texas, to be used as down payment on the Athens property. Ward was the majority stockholder and an officer of the bank and arranged for Whatley to obtain this loan. The loan was made in Whatley's name because the bank examiner objected to a bank officer obtaining a loan from the bank. Ward later paid this note out of his personal funds.

14. In April 1970 the Athens property was acquired by Whatley using the $20,800 loan proceeds from the Corsicana bank as a down payment. The Athens property was acquired in the name of Home, which at the time was owned by Whatley. Home later conveyed the Athens property to A.D.W. Enterprises, who then conveyed the property to Computer Land Title, Inc.

15. In early 1970 Whatley, Hart and Ward began to discuss the 490 acres and how to bid for it. For various reasons, including

Ward's fear that the price would go up if his name was used, Ward did not want to bid for or take title to the 490 acres in his name. Therefore, the parties discussed the possibility of using Home as an entity which would bid for and take title to the 490 acres.

16. On July 6, 1970, a bid of $480,000 for the 490 acres was submitted by Hart to the Water Board. This bid was made by Hart on behalf of Ward.

17. On July 6 two more bids were submitted to the Water Board for the 490 acre tract. Ward submitted a bid in the amount of $511,000 in the name of one of his companies, Pan American Properties, Inc. Home submitted a bid of $771,750 in its name on behalf of Ward. These two bids were submitted in order to assure that Ward obtained the 490 acre at the lowest price. If the $771,750 bid was the highest and the $511,000 was the next highest, the parties planned to have Home withdraw the $771,750 bid. On the same date another bid of $1,527 per acre, or $748,230, was submitted by Spanish Shores for the 490 acres.

18. Upon receipt of Spanish Shores' bid the Water Board indicated that it was the highest bid. In an effort to demonstrate to the Water Board that the Home bid of $771,000 was the best offer, Ward requested and received an analysis of Spanish Shores' bid and Home's bid from the Republic National Bank in Dallas, Texas, which was submitted to the Water Board. The Water Board planned to meet to discuss the offers on July 28.

19. Between July 6 and July 28 Whatley, Hart and Ward had two meetings. At these meetings they discussed the purchase of the Dyckman property by Ward. The Dyckman property abutted and possessed an easement over the 490 acres. Whatley and Hart had earlier entered into negotiations with Dyckman to purchase the Dyckman property. The parties decided that Ward's bids before the Water Board to acquire the 490 acres would be greatly enhanced if the Dyckman property was acquired by Ward prior to the July 28 Water Board meeting. Ward gave Hart $600 for his expenses to acquire the Dyckman property from Dyckman. Hart thereafter reached an agreement with Dyckman to purchase the Dyckman property for $30,500.

20. About July 24 Home acquired the Dyckman property on

behalf of Ward by way of a Warranty Deed. The consideration for this sale consisted of a $5,000 down payment furnished by Ward from his personal funds and a promissory note in the principal sum of $25,500 executed by Home secured by a vendor's lien and deed of trust on the Dyckman property. The Dyckman property was later conveyed by Home to Sentry shortly after Sentry was formed in 1972 by Whatley.

21. At about the same time Whatley, Hart and Ward also discussed acquiring the right to prosecute a law suit against the Water Board to recover some land previously owned by Jack and Pauline Lacy (the Lacys) which was a part of the 490 acres but which had been sold by the Lacy's to the Water Board. It was contemplated by the parties that the acquisition of the Lacy lawsuit would enhance Ward's efforts to acquire the 490 acres. The right to prosecute the Lacy lawsuit was acquired from the Lacys by Whatley in August 1970. Willis Moore (Moore), Ward's attorney, assisted in the acquisition of the Lacy lawsuit and Ward paid Moore's attorney's fees for filing and prosecuting the Lacy lawsuit. Later, another attorney was hired and paid for by Ward to assist in the prosecution of the Lacy lawsuit. In June 1971 Moore and Ward attempted to settle the Lacy lawsuit with the Water Board in exchange for Ward's right to acquire the 490 acres.

22. At this same time Ward engaged Hart to obtain for him a reversionary interest that Dyckman owned in a portion of the 490 acres, but Hart was unable to do so.

23. By securing the Dyckman property and accompanying easement on the 490 acres, the Lacy lawsuit and the Dyckman's reversionary interest, Ward hoped to be in a better bargaining position with the Water Board his efforts to acquire the 490 acres and to discourage other bidders for the 490 acres.

24. The above transactions were entered into pursuant to an agreement between Ward and Whatley that Whatley would take and hold title to the property which was the subject of each transaction in Whatley's name or in the name of an entity owned by Whatley for the use and benefit of Ward. By virtue thereof a "fiduciary relationship" was created and existed between Ward and Whatley as to the acquisition of the Dyckman property.

25. At the July 29, 1970, meeting of the Water Board the bids for the 490 acres were rejected and new bidding was scheduled on October 1971.

26. On November 16, 1970, at Ward's request, Whatley conveyed lake lot to M. O. Atterbury, a friend of Ward. The lot was worth between $4750 and $6500. This conveyance was not made in return for the $5000 furnished by Ward as the down payment on the Dyckman property.

27. On April 21, 1971, Whatley billed Ward for expenses he had incurred in connection with their land transactions. These expenses included the clearing of brush from the Athens property, interest on the Athens property, interest on the Dyckman property, and the expense of a survey done on the Dyckman property.

28. On October 15, 1971, two bids were submitted to the Water Board for the 490 acres. Sentry though Whatley, its president, submitted a bid of $750,000. Eastern Resort Properties submitted a bid of $801,150.

29. Another series of bids was taken by the Water Board on February 10, 1972. Sentry made a bid of $807,256, Eastern Resort Properties made a bid of $762,888, and Cedar Creek Enterprises made a bid of $785,000. On the basis of these bids the Water Board sold the 490 acres to Sentry on May 25, 1972. Ward did not bid on the 490 acres and abandoned his efforts to acquire the tract because he was of the opinion that the price being sought by the Water Board was too high.

30. In April 1972 Whatley advised Ward that title to the Dyckman property was not being held by Whatley or an entity controlled by Whatley for the use and benefit of Ward. At the time Whatley and Ward had a physical altercation over the status of their relationship. Prior to this Ward did not know that Whatley and Home were asserting an adverse interest to the Dyckman property. Subsequently, on May 16, 1972, Ward forwarded a check to Whatley for the expenses Whatley had billed him on April 21, 1971, in connection with their land transactions. Whatley rejected Ward's check.

31. In August 1972 Ward filed suit in Henderson County, Texas, against Whatley, Home, and Community Engineering. In this action Ward asserted his claim to the Dyckman proper-

ty. Ward later joined Sentry as a defendant in this action. Sentry defaulted and Ward then nonsuited the other defendants in order to obtain a final judgment against Sentry. He then immediately reasserted his claims against Whatley, Home and Community Engineering in another action filed in Henderson County in September, 1973.

32. On January 22, 1973, Sentry acquired the Dyckman property from Home. Sentry had knowledge of Ward's beneficial interest in the Dyckman property when it acquired the Dyckman property.

33. On November 14, 1974, an involuntary petition in bankruptcy was filed in Dallas, Texas, against Whatley and Home, ADW Enterprises, Community Engineering, Inc., Uticor Corp., H & D Construction Co., Inc., and Computer Land Title Co., Inc. These companies were controlled in whole or part by Whatley.

34. On November 4, 1975, Home filed a voluntary petition under Chapter XI in bankruptcy in Tyler, Texas. In this action Jerry Bain (Bain) was named as Trustee.

35. In February 1976 the Dallas bankruptcy actions were consolidated with the Tyler action, and statements of affairs and schedules were filed on behalf of all of the entities before the bankruptcy court. Sentry was not included in any of these proceedings. Neither the Dyckman property nor the Athens property was listed on any of the bankruptcy schedules. Ward was not sent official notice of these proceedings nor was he listed as a creditor of the entities involved in the bankruptcy proceedings.

36. The order confirming the plan of arrangement and the arrangement in the consolidated bankruptcy actions was signed October 10, 1979.

37. During the pendency of the bankruptcy proceedings, Bain spoke to Moore, Ward's attorney, and he knew that Moore represented Ward. Ward had knowledge of the bankruptcy proceedings, but he did not file a claim in the proceedings. Bain had knowledge of the Ward-Whatley state litigation over the Dyckman property, but he made no effort to intervene in such litigation and assert an ownership interest in the property on behalf of the debtors in bankruptcy.

38. Sentry's Certificate of Authority was forfeited in 1979 by the Texas Secretary of State, and it was reinstated on April 30, 1981.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Ward's claims to impose a constructive trust on the fund are not barred by the Texas Statute of Frauds, Tex. Bus. & Com. Code Ann. tit. 3, §26.01. *See Palmer v. Fuqua,* 641 F.2d 1146, 1159 (5th Cir. 1981); *Ginther v. Taub,* 570 S.W.2d 516, 525 (Tex. Civ. App. - Waco 1978, writ ref'd n.r.e).

3. An action to enforce a "constructive trust" upon property must be brought within four years of the date the cause of action arose. *See Miles v. Martin,* 321 S.W.2d 62, 69 (Tex. 1959); *Field Measurement Service Inc. v. Ives,* 609 S.W.2d 615, 620 (Tex. Civ. App. - Corpus Christi 1980, writ ref. n.r.e.) Ward's cause of action based on a constructive trust theory did not arise until such time as (1) he discovered the fraud on which he bases his claims or (2) he should have through reasonable diligence discovered such fraud. *Id.; Id.* at 619. However, when a confidential relationship exists between parties, the "diligence on the party defrauded does not exact as prompt and as searching an inquiry into the conduct of the other party as where the parties were strangers or were dealing with strangers." *Bush v. Stone,* 500 S.W.2d 885, 890 (Tex. Civ. App. - Corpus Christi 1973, writ ref. n.r.e.). Consequently, since Ward had no reason to know prior to April 1972 that Whatley and Home were asserting an interest in the Dyckman property which was adverse to him. Ward's cause of action arose in April 1972 when he first became aware of Whatley's and Home's adverse claims to the Dyckman property. Ward filed a suit against Home and Whatley within four years of his discovery of the fraud. He also made claims on Sentry for the Dyckman property within the limitations period. Thus, Ward's cause of action asserting ownership to the fund is not barred by the statute of limitations.

4. Ward's claims are not barred by the discharge in bankruptcy of Whatley and Home. A discharge in bankruptcy operates as an injunction against the commencement or continuation of

an action to collect, recovery, or offset a debt of the debtor. *See* 11 U.S.C. §524(a) (2). Such a discharge is personal to the bankrupt and does not release others who may be jointly liable with the debtor. *See Swinford v. Allied Finance Co.*, 424 S.W.2d 298 (Tex. Civ. App., writ dismissed), *cert. denied,* 393 U.S. 923 (1968). In addition, the owner of a beneficial interest in property can recover that interest from one who took the property with knowledge that the property is subject to a trust. *See Richards v. Combest,* 208 S.W.2d 392 (Tex. Civ. App. - Beaumont 1947, writ ref. n.r.e. Consequently, since Sentry was aware of Ward's claim to the Dyckman property Ward can properly assert his claim to the Dyckman property against Sentry; and since Sentry was not a debtor in the bankruptcy proceedings, the discharge in bankruptcy of Whatley, Home and Community Engineering which took place after Sentry acquired title to the Dyckman property does not bar Ward's claim to the fund. This conclusion is supported by the fact that neither Whatley nor Home made any claim to the Dyckman property during their bankruptcy proceedings, that Ward did not, as a creditor of Whatley or Home, receive official notice of the proceedings, and that Bain, as trustee in bankruptcy, knowingly chose not to become involved in the litigation surrounding the Dyckman property.

5. To establish a "constructive trust" as to the Dyckman property his favor Ward must show by preponderance of the evidence, *see Putaturo v. Crook,* 653 F.2d 1027 (5th Cir. 1981), that a confidential or fiduciary relationship existed prior and apart from the agreement upon which relied is sought, that the agreement sued upon was within the scope of the relationship; *see Rankin v. Naftalis,* 557 S.W.2d 940, 944 (Tex. 1977), or that it would be inequitable to allow the title holder to retain the property subject to the agreement, *see Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426 (Tex. Civ. App. - Houston (1st Dist.) 1978, writ ref. n.r.e.). The prior relationship, however, need not be based upon a written agreement between the parties; it can arise from a purely personal or informal relationship, where trust and confidence have been reposed by the parties by reason of the relationship. *See Fitz-Gerald v. Hull,* S.W.2d 256, 261 (Tex. 1951); *Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex. 1962); *Ginther v. Taub, supra* at 525. *See, also, generally Tyra v. Wood-*

son, 495 S.W.2d 211 (Tex. 1973); *Consolidated Gas & Equipment Co. v. Thompson,* 405 S.W.2d 333 (Tex. 1966).

6. Whether the relationship of the parties is a fiduciary relationship upon disputed evidence is a question of fact. *See Schiller v. Elick,* 240 S.W.2d 997, 999 (Tex. 1951).

7. Ward has established that prior to and apart from Whatley, Hart's agreement to acquire the Dyckman property in the name of Home Ward, a fiduciary, confidential relationship existed between Ward, and Hart. This confidential relationship arose when Whatley and Hart agreed to assist Ward obtain the 490 acres, and it extended to the land ventures they joined in. In addition, the agreement to buy the Dyckman property was clearly within the scope of that prior agreement and in furtherance of the prior agreement. Finally, Ward has established to allow Whatley and Sentry any interest in the fund would unjustly enrich Whatley and Sentry.

8. Ward has established that Home and Whatley, individually owner of Home, acted under a fiduciary relationship with him when Hart acquired the Dyckman property; that Home and Whatley, as owner of Home, held title to the Dyckman property in constructive trust for him; that Home's failure to transfer title of the Dyckman property to him and subsequent transfer of title to Sentry was in breach of this fiduciary relationship; and that at the time of foreclosure of the Dyckman Note Sentry held the Dyckman property in trust for him.

9. Ward is entitled to have a constructive trust imposed on the fund and recover the fund after the payment of superior claims thereto.

10. Goggans' claim for attorney's fees in the amount of $3,885 is superior to Ward's claim.

11. Ward's claim is superior to the claims of the other defendant.

12. Harris and Goggans should recover their costs of action out of the fund. Ward should recover his costs of action from Whatley and Home. All other parties should bear their own costs.

13. Counsel for Ward should prepare a judgment in accordance with these findings of fact and conclusions of law and other orders of this Court.

Dated this 25th day of November, 1981.

United States District Judge

APPENDIX J

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SSENTRY TITLE COMPANY, ET AL,

DEFENDANTS

CONCLUSIONS OF LAW ON DEFENDANT WARD'S RESULTING TRUST CLAIM

On September 13, 1984, this Court granted defendant Travis Ward's motion to consider and decide his claim of resulting trust. Thereafter the parties submitted their briefs on this issue. The Court hereby adopts its findings of fact made on November 25, 1981, and now makes the following additional conclusions of law on the resulting trust claim asserted by defendant Ward.

1.

In Texas the doctrine of resulting trust is succinctly expressed in *Cohrs v. Scott*, 338 S.W.2d 127 (Tex. 1960):

> A resulting trust arises by operation of law when title is conveyed to one person but the purchase price of a portion thereof is paid by another. The parties are presumed to have intended that the grantee hold title to the use of him who paid the purchase price and whom equity deems to be the true owner. The trust arises out of the transaction and must arise *at the time when the title passes.*

338 S.W.2d at 130 (citing Morrison v. Farmer, 213 S.W.2d 813 (Tex. 1948) (emphasis in original); *see also Montgomery v. Thomas*, 146 F.2d 76 (5th Cir. 1944) (Texas case); *Equitable Trust*

Co. v. Roland, 644 S.W.2d 46, 51 (Tex. App. 1982—San Antonio, no writ) (A resulting trust does not arise from an agreement between parties but as a matter of law). A resulting trust as distinguished from an express or constructive trust, is a trust that is implied on a transaction based on the acts off the parties and not upon what they said or agreed to do. *Miller v. Donald,* 235 S.W.2d 201, 205 (Tex. Civ. App.—Ft. Worth 1950, writ ref'd n.r.e.). A resulting trust involves application of the equitable doctrine that valuable consideration and legal title determines the equitable title to property resulting from a transaction. *Knox v. Long*, 251 S.W.2d 911, 919 (Tex. Civ. App.—Texarkana 1952) *rev'd on other grounds*, 257 S.W.2d 289 (Tex. 1953); *Tollie v. Sawtelle*, 246 S.W.2d 916, 918 (Tex. Civ. App.—Eastland 1952, writ ref'd). Thus the furnishing of consideration in the acquisition of property is relevant to the existence *vel non* of a resulting trust.

2.

Under the foregoing principles, where one party buys land with the funds of another party and the purchasing party takes title to the property in his name, the resulting trust arises in favor of the party furnishing the funds; under such circumstances, the party furnishing the funds is the equitable owner of the land and the purchasing party acts as a trustee and holds the land for the beneficial interest of the party furnishing the funds. 57 Tex. Jur.2d *Trusts*§43. A resulting trust will arise under such circumstances unless the party furnishing the funds and in whose favor a trust results manifests an intention not to retain beneficial interest in the land. *Elliott v. Mansfield,* 398 S.W.2d 442, 443 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.).

3.

In July 1970 Whatley, Hart and Ward agreed that Ward should acquire the Dyckman property in order to enhance his efforts to acquire the 490 acres from the Water Board; Ward furnished Hart $600 in expense money for this purpose. *See* Finding of Fact 19. The acquisition of the Dyckman property was pursuant to an agreement between Ward and Whatley that Whatley would acquire title to the property as grantee in his name or in the name of an entity owned by Whatley. *See* Finding of Fact 24. Thereafter, Home, an entity owned by Whatley, acquired the Dyckman property for a purchase price of $30,500. Ward fur-

nished $5,000 as a down payment on the purchase price and Home executed a promissory note in the amount of $25,000 for the balance of the purchase price, secured by a vendor's lien and deed of trust on the property. *See* Finding of Fact 20.

4.

Under applicable principles of Texas law, since Ward furnished funds for the purchase of the Dyckman property, Home's acquisition of the property gave rise to a resulting trust in favor of Ward in the property at the time of the passage of title of the property to Home. Ward, in effect, was vested with an equitable ownership of the property and Home held the property as a trustee to the extent of the beneficial interest owned by Ward. Ward's beneficial ownership was not thereafter defeated because neither at the time of the acquisition of the property, not at any later time, did he manifest any intention not to retain his beneficial ownership of the property. Nor was Ward's beneficial ownership of the property later abrogated by Home's conveyance of the property to Sentry, because Sentry, like Home, was another entity owned by Whatley.

5.

Since the fundamental basis for the creation of a resulting trust is that the beneficial title follows the consideration furnished, the ownership interest of a beneficiary in the trust property is dependent on the amount of the contribution that the beneficiary made to the purchase price of the property. If only a portion of the purchase price was contributed by the beneficiary, then his beneficial ownership in the property extends to the proportion that his contributions bears to the total purchase price of the property. *Wright v. Wright,* 132 S.W.2d 847, 849-50 (Tex. 1939); *Bybee v. Bybee*, 644 S.W.2d 218, 221 (Tex. App.—Ft. Worth 1982, no writ); 57 Tex. Jur.2d Trust §44. A claimant of an equitable interest in property who subsequent to the passage of legal title of the property to the purchase contributes to the purchase money of the property may establish a resulting trust if he proves that he became obligated to the purchase to pay such money before, or concurrently with, the conveyance of the property to the purchaser. In this instance, the purchase price paid will be considered as having been paid by the funds of the one who agreed to repay the purchaser. *Stone v. Boone*, 160 S.W.2d 578, 581 (Tex. Civ. App.—Ft. Worth 1942, writ ref. w.o.m.);

Elbert v. Waples-Platter Co., 156 S.W.2d 146, 150 (Tex. Civ. App.—Ft. Worth 1941, writ ref. w.o.m.); *Vicars v. Quinn*, 154 S.W.2d 947, 949 (Tex. Civ. App.—El Paso 1941, no writ); 57 Tex. Jur. *Trusts*§47. Further, one claiming an equitable interest in property under a promise to furnish the purchase price consideration to the party acquiring title to the property must show not only that he made the promise but that he is "solvent and able to carry out the contract."*Hammon v. United Royalties Corp.*, 25 S.W.2d 961-962 (Tex. Civ. App.—Ft. Worth 1930, writ dismissed). The promise of a principal to reimburse an agent for liability the agent incurs on behalf of the principal is a legally enforceable obligation of the principal as a matter of law. *Mortgageamerica Corporation v. American National Bank of Austin*, 651 S.W.2d 851, 857 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (agent may recover from his principal any loss suffered in the performance of his duties for his principal); *Minnesota Mutual Life Insurance Company v. Weeks* 408 S.W.2d 128, 130 (Tex. Civ. App.—Houston 1966, no writ); *Butler v. Continental Oil Co.*, 182 S.W.2d 843, 846 (Tex. Civ. App.—Galveston 1944, no writ).

6.

Applying the foregoing principles, the Court concludes that Ward is entitled to the imposition of a resulting trust on the entirety ownership of the Dyckman property. Ward furnished the $5,000 down payment on the $30,500 purchase price of the Dyckman property. *See* Finding of Fact 20. Accordingly, he was entitled to a beneficial ownership interest in the property at least to the extent that his $5,000 contribution bears to the $30,500 purchase price of the property, or a 10/61 beneficial interest in the property. Before, or at the time of, the purchase of the Dyckman property, Ward also agreed and became obligated to reimburse Whatley (or the entity owned by Whatley to whom the property was conveyed), for such sums as might be expended on the $25,500 vendor's lien retained by the seller. *See* Findings of Fact 19, 20, 23 and 24. This understanding between parties is evidenced by the April 21, 1971, billing that Whatley made to Ward for the interest expense and survey expense that Whatley had incurred in connection with his acquisition of the Dyckman property, *see* Finding of Fact 27, and the delivery by Ward to Whatley on May 16, 1972, of a check in payment of these ex-

penses. *See* Finding of Fact 30. Since Whatley had acquired the Dyckman property while acting as Ward's agent, Ward was legally obligated to reimburse Whatley (or the entities caused by him) for the expenses and payments made on the vendor's lien.

7.

Ward at all times in his dealings with Whatley over the Dyckman property evidenced the fact that he was claiming a beneficial ownership interest in the entirety of the property. Following Whatley's disclosure to Ward in April 1972 that he was not holding the property for Ward, Ward's belief that he was the beneficial owner of the property led him into a physical altercation with Whatley, *see* Finding of Fact 30; further Ward subsequently filed suit in August 1972 in state court against Whatley, Home and Sentry asserting his ownership of the property. *See* Finding of Fact 31.

8.

Ward has established that the resulting trust over the Dyckman property under which he is the beneficiary extended not just to a portion but to the entirety of property; that Home's failure to convey the property to him and its conveyance of the property to Sentry, who had knowledge of Ward's beneficial interest, *see* Finding of Fact 32, was in breach of Ward's rights to the ownership of the property. At the time of the foreclosure of the Dyckman Note (vendor's lien) Sentry held the property in trust for Ward. Accordingly, Ward is entitled, as the beneficial owner of the Dyckman property prior to the foreclosure, to the ownership of the proceeds of $250,000 which were obtained from the foreclosure sale, less the sum of $3,462.50 to be awarded to Sentry representing the amount it or its predecessor in-title paid toward the acquisition of the Dyckman property.

It is so ORDERED.

Dated this 8th day of October, 1985.

_____

United States Circuit Judge
Sitting by Designation

APPENDIX K

Sentry III was in error concluding that *Sentry I* adjudicated resulting trust claim. Graphic analysis demonstrating that resulting trust claim was not decided until the case was remanded to District Court after *Sentry I* and *Sentry II*.

Harris v. Sentry (First District Court Decision) APPENDIX I	*SENTRY I* 715 F.2d 941 (5th Circuit 1983)	*SENTRY II* 727 F.2d 1368 (5th Cir. 1984)	*Harris v. Sentry* (Second District Court Decision) APPENDIX J	*SENTRY III* 806 F.2d 1278 (5th Circuit 1987)	Internal Operating Procedure Fifth Circuit
Imposed constructive trust in Petitioner's favor upon finding that Respondent breached a fiduciary relationship which encompassed the property in issue.	Reversed District Court imposition of constructive trust holding there must be a fiduciary relationship separate and unrelated to property at issue.	Ruled on recall of mandate and further explained the court's position that there must be a separate fiduciary relationship unrelated to property at issue to impose constructive trust.	Imposed resulting trust.	Reversed District Court's imposition of resulting trust. [See also due process and equal protection gap apparent from comparison of (2) below and internal operating procedure in next column].	[See due process and equal protection gap apparent from comparison of rules below with (2) under *Sentry III*].
Resulting trust issue: Made no ruling on resulting trust since case ruled favorably on constructive trust claim.	Resulting trust issue: Discussed resulting trust in dicta but only ruled upon the constructive trust claim. See footnote 4. Found that resulting trust was not involved in the appeal. *Id.* Stated that the exception to its ruling was a resulting trust but that resulting trust was not involved in the appeal. *Id.*	Resulting trust issue: does not even mention resulting trust.	Resulting trust issue: Reviewed Texas law and concluded that under facts of the case resulting trust should be imposed in Petitioner's favor.	Resulting trust issue: Held that resulting trust should not be imposed because: (1) *Sentry I* adjudicated the resulting trust issue; (2) Even if *Sentry I* had been in error on the resulting trust issue it must follow the erroneous decision because one panel cannot disregard the precedent of prior panel even if it considers it erroneous.	Resulting trust issue: En banc panel depends on panels to correct erroneous applications of state law. En banc court will not review state law issues.

APPENDIX L

COMPARISON OF LINE OF TEXAS SUPREME COURT CASES RECOGNIZED BY *GINTER V. TAUB* AND THE FIFTH CIRCUIT IN *PALMER V. FUQUA*, TO *HARRIS V. SENTRY TITLE CO.*, ILLUSTRATING EGREGIOUS, IRRECONCILABLE CONFLICT JUSTIFYING SUPREME COURT REVIEW OR SUPERVISION

Ginter V. Taub, the most recent Texas Supreme Court case reviewing circumstances appropriate for imposition of a constructive trust and the Fifth Circuit Court of Appeals in *Palmer v. Fuqua*, recognized a line of cases upholding imposition of constructive trusts where the property at issue is directly related to a prior fiduciary relationship.

Huffington v. Upchurch, 532 S.W.2d 576 (Tex. 1976); 523 S.W.2d 44 (Tex. Civ. App. 1975)	*Rankin v. Naftalis* 557 S.W. 2d 949 (Tex. 1977)	*Palmer v. Fuqua* 541 F.2d 1144 (5th Cir. 1981)	*Harris v. Sentry Title Co., Inc.* 715 F.2d 941 (5th Cir. 1983); 727 F.2d 1368 (5th Cir. 1984).
Recognized that property at issue *directly related to a prior fiduciary relationship is sufficient* to impose constructive trust.	Recognized that property at issue *directly related to a prior fiduciary relationship is sufficient* to impose constructive trust.	Recognized that property at issue *directly related to a prior fiduciary relationship is sufficient to impose constructive trust.*	Held that *because* property at issue *directly related to a prior fiduciary relationship*, the prior fiduciary relationship *not sufficient to support imposition of constructive trust*. Held that prior fiduciary relationship must be a separate and independent relationship, unrelated to the property at issue.
Pertinent Facts: An action to impose a constructive trust on certain property (the Indonesian venture, the property at issue), which was *acquired pursuant to* an acquisition plan which gave rise to a *fiduciary relationship* between the parties *prior to the acquisition of the property at issue*.	**Pertinent Facts:** An action to impose a constructive trust on certain property, (the Orsak lease, the property at issue). The property at issue was not, however, directly related to or thus acquired within the scope of a prior fiduciary relationship pertaining solely to a prior lease, the Melton lease.	**Pertinent Facts:** An action to impose a constructive trust on certain property (the Ritchie lease, the property at issue), which was *acquired pursuant to* an acquisition plan which gave rise to a *fiduciary relationship* between the parties *prior to the acquisition of the property at issue*.	**Pertinent Facts:** An action to impose a constructive trust on certain property (the Dyckman tract, the property at issue), which was *acquired pursuant to* an acquisition plan which gave rise to a *fiduciary relationship* between the parties *prior to the acquisition of the property at issue*.
The Court found that the prior relationship between the parties regarding the acquisition plan was fiduciary in character. *Id.* at 579.	The Court found that while the prior relationship between the parties pertaining to a prior lease, (the Melton lease), was fiduciary in character, the fiduciary relationship was limited solely to that particular lease. *Id.* at 944.	The Court found that the prior relationship between the parties regarding the acquisition plan was fiduciary in character. *Id.* at 1155.	The Court found that the prior relationship between the parties regarding the acquisition plan was fiduciary in character. *Id.* at 948.
The Court found that *acquisition of the property at issue* was *directly related*, and thus, within the scope of the *prior fiduciary relationship* which the parties relied upon as the basis for imposition of a constructive trust. *Id.* at 578; 523 S.W.2d 44 (Tex. Civ. App. 1975).	The Court found that the property at issue was *not* directly related to, or thus, within the scope of the prior fiduciary relationship which the parties relied upon as the basis for imposition of a constructive trust. *Id.* at 944.	The Court found that *acquisition of the property at issue* was *directly related*, and thus, within the scope of the *prior fiduciary relationship* which the parties relied upon as the basis for imposition of a constructive trust. *Id.* at 1155, 1157.	The Court found that *acquisition of the property* at issue was *directly related*, and thus, within the scope of the *prior fiduciary relationship* which the parties relied upon as the basis for imposition of a constructive trust. *Id.* at 948; 727 F.2d 1368, 1370.
Issue: Whether the prior fiduciary relationship found to exist between the parties was sufficient to support imposition of a constructive trust on the property at issue before the Court?	*Issue*: Whether the prior fiduciary relationship found to exist between the parties was sufficient to support imposition of a constructive trust on the property at issue before the Court?	*Issue*: Whether the prior fiduciary relationship found to exist between the parties was sufficient to support imposition of a constructive trust on the property at issue before the Court?	*Issue*: Whether the fiduciary relationship found to exist between the parties was sufficient to support imposition of a constructive trust on the property at issue before the Court?
Holding and Rationale: The Court imposed a constructive trust on the basis that the *property at issue* before the Court, the Indonesian venture, was *directly related*, and thus within the scope of the *prior fiduciary relationship*, and that therefore, the prior fiduciary relationship *was sufficient* to support imposition of a constructive trust. *Id.* at 578; 523 S.W.2d 44 (Tex. Civ. App. 1975).	**Holding and Rationale:** The Court did *not* impose a constructive trust on the basis that the property at issue before the Court, the Orsak lease, was *not* directly related, and thus, *not* within the scope of the prior fiduciary relationship, and that therefore, the prior fiduciary relationship was *not* sufficient to support imposition of a constructive trust. *Id.* at 944. *Importantly*, in citing *Huffington*, and consistent with the 5th Circuit in *Palmer*, *the Court held that had the property at issue been directly related to or thus within the scope of the prior fiduciary relationship, the prior fiduciary relationship would have been sufficient to support imposition of a constructive trust. Id.* at 943-944.	**Holding and Rationale:** The Court imposed a constructive trust on the basis that the *property at issue* before the Court, the Ritchie lease, was *directly related*, and thus within the scope of the *prior fiduciary relationship*, and that therefore, the prior fiduciary relationship *was sufficient* to support imposition of a constructive trust. *Id.* at 1157-1158, 1160. (The 5th Circuit relied upon *Rankin and Huffington*, *Id.* 1157-1158.)	**Holding and Rationale:** The Court held that the *prior fiduciary relationship* between the parties was *not sufficient* to support imposition of a constructive trust *because the subsequent property transaction at issue* was *directly related*, and thus within the scope of the fiduciary relationship. *Id.* at 948; 727 F.2d 1368, 1370. The Court held that while the Tarrant County land deal (the acquisition plan) gave rise to a prior fiduciary relationship which encompassed the subsequent Dyckman transaction, the *Tarrant County land deal, (the acquisition plan) could not serve to establish a sufficent prior fiduciary relationship* as to the Dyckman property for purposes of imposition a constructive trust, *since* the Tarrant County deal was *not a separate and independent dealing, unrelated to the Dyckman property at issue* before the Court. *Id.* at 948; 727 F.2d 1368, 1370.

APPENDIX M

TEXAS SUPREME COURT CASES

1. *Nolana Development Ass'n v. Corsi*, 682 S.W.2d 246 (Tex. 1984).
2. *Henry S. Miller Company v. Evans*, 452 S.W.2d 426 (Tex. 1970)
3. *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968).
4. *Leyva v. Pacheco*, 163 Tex. 638, 358 S.W.2d 547 (Tex. 1962).
5. *Cohrs v. Scott*, 161 Tex. 111, 338 S.W.2d 127 (Tex. 1960).
6. *Jackson v. Hernandez*, 155 Tex. 249, 285 S.W.2d 184 (Tex. 1955).
7. *San Antonio Loan & Trust Co. v. Hamilton*, 155 Tex. 52, 283 S.W.2d 19 (Tex. 1955).

TEXAS COURT OF APPEALS CASES

8. *Johnston v. Marbrey*, 677 S.W.2d 236 (Tex. App.—Corpus Christi 1984, no writ).
9. *Corsi v. Nolana Development Ass'n*, 674 S.W.2d 874 (Tex. App.—Corpus Christi, *rev'd*, 682 S.W.2d 246 (Tex. 1984).
10. *Lifemark Corp. v. Merritt*, 655 S.W.2d 310 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).
11. *Bybee v. Bybee*, 644 S.W.2d 218 (Tex. App.—Fort Worth 1982, no writ).
12. *Equitable Trust Co. v. Roland*, 644 S.W.2d 46 (Tex. App.—San Antonio 1982, no writ).
13. *Crume v. Smith*, 620 S.W.2d 212 (Tex. Civ. App.—Corpus Christi 1981, no writ).
14. *Villarreal v. Villarreal*, 618 S.W.2d 99 (Tex. Civ. App.—Corpus Christi 1981, no writ).
15. *Uriarte v. Petro*, 606 S.W.2d 22 (Tex. CIv. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).
16. *Jewell v. Jewell*, 602 S.W.2d 315 (Tex. Civ. App.—Texarkana 1980, no writ).
17. *City of Wichita Falls v. Kemp Public Library Board of Trustees*, 593 S.W.2d 834 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).
18. *Muhm v. Davis*, 580 S.W.2d 98 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).
19. *Faglie v. Williams, 569 S.W.2d 557 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).*

20. *Brelsford v. Scheltz,* 564 S.W.2d 404 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).
21. *Sheldon Petroleum Co. v. Peirce,* 546 S.W.2d 954 (Tex. Civ. App.—Dallas 1977, no writ).
22. *Baxter v. Williams,* 544 S.W.2d 192 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).
23. *Bell v. Smith,* 532 S.W.2d 680 (Tex. Civ. App.—Fort Worth 1976, no writ).
24. *Grunwald v. Grunwald,* 487 S.W.2d 240 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).
25. *Crockett v. Smith,* 485 S.W.2d 321 (Tex. Civ. App.—Tyler, 1972, writ ref'd n.r.e.).
26. *Whitehead v. Teague,* 483 S.W.2d 378 (Tex. Civ. App.—Tyler 1972, no writ).
27. *Allen v. Rodriguez,* 480 S.W.2d 270 (Tex. Civ. App.—Austin 1972 writ ref'd n.r.e.)
28. *Atkins v. Carson,* 467 S.W.2d 495 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.).
29. *Friedman v. Powell Electrical Manufacturing Co.,* 456 S.W.2d 758 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ).
30. *Carson v. White,* 456 S.W.2d 212 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).
31. *Dorbandt v. Bailey,* 453 S.W. 205 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.).
32. *Stone v. Parker,* 446 S.W.2d 734 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).
33. *Hidalgo County V. Pate,* 443 S.W.2d 80 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).
34. *Murphy v. Johnson,* 439 S.W.2d 440 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ).
35. *Wilson v. Willbanks,* 417 S.W.2d 925 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).
36. *Bridges v. Bridges,* 404 S.W.2d 48 (Tex. Civ. App.—Beaumont 1966, no writ).
37. *Elliott v. Mansfield,* 398 S.W.2d 442 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.)
38. *Hereford Land Co. v. Globe Industries, Inc.,* 387 S.W.2d 771 (Tex. Civ. App.—Tyler 1965, no writ).
39. *Morrison v. Parish,* 384 S.W.2d 764 (Tex. Civ. App.—Texarkana 1964, writ dism'd)

40. *National Bank of Commerce v. Dunn*, 381 S.W.2d 654 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).
41. *Adams v. Kloepper*, 364 S.W.2d 865 (Tex. Civ. App.—Austin 1963, no writ).
42. *Hammett v. McIntire*, 365 S.W.2d 844 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.).
43. *Leyva v. Pacheco*, 352 S.W.2d 898 (Tex. Civ. App.—El Paso 1961), *rev'd* 358 S.W.2d 547 (Tex. 1962)
44. *Usery v. Lacy* 351 S.W.2d 327 (Tex. Civ. App.—Dallas 1961).
45. *Williamson v. Baytown Sun, Inc.*, 325 S.W.2d 723 (Tex. Civ. App.—Waco 1959, no writ)
46. *Cadmus v. Evans*, 320 S.W.2d 176 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.).
47. *Wimberly v. Kneeland*, 293 S.W.2d 526 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.).
48. *Ayoub v. Herold*, 287 S.W.2d 539 (Tex. Civ. App.—El Paso 1955, writ ref'd n.r.e.).
49. *Kurtz v. Robinson*, 279 S.W.2d 949 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.).
50. *Lail v. Hankla*, 176 S.W.2d 340 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.).

EXPLANATION

Ward's counsel limited their case by case review to those cases beginning in 1955 only because of the great number of Texas cases in which a resulting trust has been mentioned and, therefore, appears on Westlaw.

(3)

No. 86-1791

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TRAVIS WARD,

Petitioner,

v.

SENTRY TITLE CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this case presents any questions of important public policy sufficient to justify that this Court review the entire factual record?

2. Whether the Fifth Circuit and this Court have previously considered and adjudicated the resulting trust issue foreclosing it from further consideration under the Law-of-the-Case Doctrine?

3. Whether the Fifth Circuit, in applying the Law-of-the-Case Doctrine, was correct in refusing to disregard the precedent set by the panel in *Sentry I?*

4. Whether the Fifth Circuit Court of Appeals correctly interpreted the substantive Texas law regarding resulting trust?

5. Whether in reviewing the district court decision, the Fifth Circuit Court of Appeals allowed Petitioner due process and equal protection under the Due Process Clause of the Fifth and Fourteenth Amendments and the Rules of Decision Act?

6. Whether Petitioner is now pursuing frivolous remedies in an attempt to thwart the results of his unsuccessful appeals?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

NO. 86-1791

IN THE

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TRAVIS WARD,

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v.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents pray that Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled case, entered September 26, 1983, affirmed on March 12, 1984, and again affirmed on January 7, 1987, be denied, and that Respondents be awarded damages.

COUNTERSTATEMENT OF THE CASE

This case involves title to a 9-acre lakefront tract of land located near Athens, Texas, referred to in this litigation as the "Dyckman Tract." Two other tracts, an adjoining 490-acre tract over which passed an easement to the Dyckman Tract and a 16-acre tract located in Athens, Texas (the "LaRue Tract") also figured prominently in this case. Title to all three tracts was taken in the name of Respondent, Sentry Title Co., Inc., or in the name of another company (Home Engineering, Inc.) controlled by Respondent's sole shareholder, Alan Whatley ("Whatley"). Petitioner sought, in this action, to impose either a constructive or a resulting trust on the Dyckman Tract.

Petitioner was a sophisticated and experienced businessman who had known of Whatley for several years but never met him until sometime in 1969 when they first met casually. Thereafter, beginning sometime in the spring of 1970, they met several times to discuss possible land deals in the Athens, Texas area. Their discussions finally focused on the desirability of acquiring the 490-acre tract which Whatley had been negotiating to acquire for some months.[1] Whatley and his then attorney, Bill Hart, had also previously been negotiating with Dyckman to acquire the 9-acre tract.[2] Thereafter, between July 6, 1970 and July 28, 1970, Petitioner Whatley and Hart had two meetings concerning the purchase of the Dyckman property. On or about July 24, 1970, the Dyckman Tract was sold to Home Engineering, Inc., a company controlled by Whatley, for $30,500. The purchase price included a promissory note for $25,500 *from Home* to Dyckman.

All subsequent payments made on the Dyckman note were made by *Home* and the property was rendered for ad valorem

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[1] *Harris v. Sentry Title Co., Inc.*, 715 F2d 941, 944 (5th Cir. 1983) (hereinafter referred to as *Sentry I.*)

[2] Findings of Fact and Conclusions of Law, Findings of Fact No. 19.

property tax purposes by *Home*. Whatley or his companies were also the makers of the promissory notes given for the other two properties.

After Home encountered financial difficulties, the Dyckman Tract was foreclosed upon and Petitioner asserted a constructive trust or resulting trust on the proceeds from that foreclosure, claiming that Respondent was purchasing the Dyckman Tract (and the other properties) for Petitioner's benefit. Ward, contending that Whatley and his companies had acquired the properties for Ward's benefit, confronted Whatley at Whatley's office. After an altercation, Ward promised that he would make Whatley "sorry" for having become involved in these deals.[3]

Throughout the proceedings in the trial court and court of appeals, and in the course of the previous petitions to this Court,[4] Petitioner contended that the property should be held in either a constructive or a resulting trust in favor of Petitioner. Otherwise, the Texas Statute of Frauds and Texas Trust Act would have foreclosed Ward's claim. That argument having been rejected seven times by the Fifth Circuit (three times in published opinions and four times in refusals to grant motions for rehearing and suggested rehearings *en banc*), and certiorari having been previously denied twice, Ward now seeks to again attempt to pursuade this Court that the Fifth Circuit misapplied Texas law to the somewhat complicated facts in this case, that the issue of resulting trust was never previously adjudicated and that Texas law, contrary to the Fifth Circuit's opinion, allows imposition (based on these facts) of a resulting trust in Ward's favor. Ward neglects to mention that he previously unsuccessfully raised the *resulting trust issue* at the appellate level three times: (1) in his first Motion for Rehearing following *Sentry I;* (2) in his second Motion for Rehearing and second Suggestion

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[3] Trial transcript p. 612.

[4] No. 83-1581 and No. 84-547.

for Rehearing *En Banc* following *Sentry II*; and (3) in his first Petition for a Writ of Certiorari in this Court.[4] Ward also neglects to mention that while the *Sentry I* panel noted in footnote number 4 that neither party raised *in their briefs* the issue of resulting trust, the court *in the body of its opinion* clearly analyzed, addressed, and *rejected* resulting trust as an alternative theory of upholding the district court judgment in Ward's favor.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Questions Of Important Public Policy And Would Require This Court To Sift Through The Entire Factual Record To Review The Fifth Circuit's Decision.

Petitioner, for the third time in this Court, alleges that the Fifth Circuit violated the *Erie* Doctrine. It has never been disputed that Texas substantive law governs this action. The Court of Appeals recognized this requirement[5] and correctly interpreted the controlling Texas law and applied it to the facts of this case. In truth, Petitioner does not claim an *Erie* violation but, rather, merely quarrels with the results of the Fifth Circuit's application of Texas law to the facts of this case. Petitioner's arguments for application of the *constructive* trust theory have now been presented four times to the Fifth Circuit and two times to this Court, all of which found no acceptance. Petitioner's arguments for application of the *resulting* trust theory have now also been presented four times to the Fifth Circuit and once to this Court; and having not previously found acceptance, Petitioner *now again* seeks relief from this Court. The Petition presents no unusual questions or questions of particularly

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[4] No. 83-1581 and No. 84-547.

[5] *Sentry Title Co., supra.* at 945. [715 F2d 941 (5th Cir. 1983)]

important public policy. Rather, the case is simply an ordinary exercise in the application of Texas substantive law to the facts at hand. Petitioner is merely dissatisfied with the outcome of that application.

Petitioner asserts that the manner in which the Fifth Circuit addressed Petitioner's state law claim of resulting trust resulted in " . . . a patently obvious inequitable administration of federal law form over state law substance."[6] The only inequitable administration of law has been Petitioner's own abuse of the appellate process by infringing upon the Court's time and the Respondent's due process right that all litigation should ultimately be brought to an end.

The arguments in Petitioner's *third* petition for a writ of certiorari, once again, fail to fall within the purview of those questions which will normally give rise to granting review (Supreme Ct. Rule 17.1(a)), inasmuch as there is no conflict between the decisions of the Fifth Circuit and any decision of the Texas Supreme Court (or, for that matter, of this Court). As can be seen from the truncated statements of the case contained in the Petition and this Response, as well as far more detailed statements reflected in the three opinions of the Court of Appeals, the determination of the merits of this case is highly dependent upon a full appreciation of the *entire* factual record developed in the trial. The decisions of the Court of Appeals reflect an intimate intertwining of the facts of the case (those specifically found by the trial court and those which are undisputedly in the trial record) with the case law of Texas.

Put another way, the Petitioner merely requests that this Court grant a writ of certiorari to review the full evidentiary record and any inference that might be drawn and substitute its judgment for that reflected in the these prior appeals court opinions. This does not form a sufficient basis for issuance of a

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[6] Petition For A Writ of Certiorari, p. 8.

writ of certiorari.[7] The petition presents, in major part, the question of whether there is sufficient evidence to support imposition of a resulting trust on real property. This is just the type of factual inquiry into which this Court has repeatedly declined to engage.[8]

The Petitioner's Appendix K, a spreadsheet comparing the results of decisions reached in this case throughout the appellate process, attempts to show that the resulting trust issue was not adjudicated until the case was remanded to the District Court after *Sentry II*. While such a graphic display is interesting, it is inaccurate and completely misconstrues the opinions of the Fifth Circuit and the briefs presented in that Court.

II. The Fifth Circuit And This Court Have Previously Considered And Adjudicated The Resulting Trust Issue Foreclosing It From Further Consideration Under The Law-Of-The-Case Doctrine.

Petitioner alleges that the resulting trust issue was never adjudicated. The original judgment entered by the District Court awarded Petitioner the interpleader fund *solely* on the basis of his constructive trust claim. That judgment specifically rejected such other claims as were advanced by the parties, including Petitioner's resulting trust claim, with the clear and unambiguous statement that "all other relief not expressly granted herein is denied." That judgment and the provision here quoted was prepared by Petitioner's own attorneys.

Applying Texas law *pursuant to the Erie Doctrine,* it has been well settled since at least 1896 that where

> . . . the pleadings upon which the trial was had put in issue Plaintiff's right to recover upon two causes of action, and

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[7] *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938).

[8] *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

> the judgment awards him a recovery upon one, but is silent as to the other, *such judgment is prima facie an adjudication that he was not entitled to recover upon such other cause.* (emphasis added)[9]

This holding has been often cited and always followed. For example, in *Garrett v. A. G. McAdams Lumber Co.*, 163 S.W. 320 (Tex. Civ. App. — Amarillo 1914), reh. den., the court reviewed a judgment awarding a plaintiff recovery on one of two alternative theories advanced at the trial. The trial court entered judgment favorable to Plaintiff on one of the theories only. The appeals court held that an adjudication of liability of the defendant on one theory was "prima facie an adjudication that the [plaintiff] was not entitled to recover upon the [other theory] . . . ." *Id.* at 323. This holding was followed as recently as 1981 in *Schlipf v. Exxon Corp.*, 626 S.W.2d 74, 77 (Tex. Civ. App. — Houston 1981).

In the case at bar, the resulting trust claim was rejected not only by implication, but by the *express* language of the Judgment. Petitioner did not appeal that provision either directly or by way of cross-appeal. The reason for the rule is apparent and this case demonstrates its wisdom. Were it otherwise, a party such as Petitioner could advance numerous offensive or defensive theories by way of pleadings and litigate one at a time, seriatim. As in this case, such actions lead to endless litigation and appellate review which clearly is an unjust administration of the law.

Under the *Erie* Doctrine, Texas cases on *res judicata* and collateral estoppel should apply, however, it makes little difference whether one looks to the federal rules applicable to *res judicata* or the Texas cases previously cited because as the Fifth Circuit has previously noted ". . . in both federal courts and

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[9] *Rackley v. Fowlkes*, 89 Tex. 613, 36 S.W. 77, 78 (Tex. 1896), accord; *Schlipf v. Exxon Corp.*, 626 S.W.2d 74, 77 (Tex. Civ. App. — Houston, 1981); *Garrett v. A. G. McAdams Lumber Co.*, 163 S.W. 320 (Tex. Civ. App. — Amarillo 1914) reh. den.

Texas state courts, a judgment is final not only as to all matters which were decided, but also as to all matters which might have been tried."[10]

Furthermore, on no less than four occassions in the appellate process, Ward has raised this issue. His point has been considered and rejected by the Fifth Circuit and this Court. Petitioner's assertion that the issue was not adjudicated until the case was remanded to the District Court after *Sentry II* simply reflects his unwillingness to read the clear language of the Fifth Circuit's original opinion where the Court considered the issue and conclusively disposed of it by stating that "[t]he resulting trust analysis does not apply to this case . . . ."[11] Furthermore, the Fifth Circuit in *Sentry III* addressed this very issue and, stating that the court's opinion in *Sentry I* must be read as a whole, held that ". . . this Court had previously considered the alternative theory of resulting trust and rejected it . . . ."[12] The Court further stated "That the theory of resulting trust was considered on the prior appeal is further enforced by the strong dissent that was put forth by the Hon. Hubert L. Will, sitting on this Court by designation."[13] "Such statements constitute the 'professed deliberate determinations of the [court]' and, when done in this fashion, may not be summarily dismissed as dictum."[14]

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[10] *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982); *Hall v. Tower Land and Investment Company*, 512 F.2d 481 (5th Cir. 1975), accord, *Aerojet-General Corporation v. Askew*, 511 F.2d 710 (5th Cir. 1975).

[11] *Sentry I, supra.* at 946.

[12] *Harris v. Sentry Title Co., Inc. (Sentry III)*, 806 F.2d 1278, 1280 (5th Cir. 1987).

[13] *Sentry III, supra.* at 1280.

[14] *Sentry III, supra.*, footnote at 1280.

III. The Fifth Circuit, In Applying The Law-Of-The-Case Doctrine, Was Correct In Refusing To Disregard The Precedent Set By The Panel In *Sentry I.*

Petitioner next argues that the Fifth Circuit panel erred in holding that it could not rule differently on the state law claim even if it perceived the resulting trust ruling by the prior panel to be contrary to controlling state law. Petitioner's characterization of the Fifth Circuit's opinion is inaccurate.

A federal court enunciating a rule of law to be applied in a particular case establishes the "law of the case," which "other courts owing obedience to it *must,* and which itself will, normally apply to the same issues in subsequent proceedings in that case." *Wm. G. Roe and Co. v. Armour and Co.,* 414 F.2d 862, 867 (5th Cir. 1969), citing *United States v. 162.20 Acres of Land,* 733 F.2d 377, 379 (5th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).

> The court in *Roe* further stated that the law of the case
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> *must* be *followed* in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, *unless* the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or *the decision was clearly erroneous and would work a manifest injustice.* (Court's emphasis)

The language cited above in the *Roe* case is crucial in that the Fifth Circuit in *Sentry III* relied on the opinion of *Roe* in deciding to apply the law-of-the-case doctrine. The court refused to disregard the precedent set by the prior panel and stated "[i]n the instant case, we see no grounds *or 'manifest injustice'* requiring a reexamination of the Court's prior opinion."[15] Thus, under *Roe,* the Fifth Circuit was correct in following the law of the case.

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[15] *Sentry III, supra.* at 1282.

Such a manifest injustice *would occur,* however, if the resulting trust issue were allowed to be relitigated again. As this Court and the Fifth Circuit have already held: "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States of America and Interstate Commerce Commission v. United States Smelting, Refining & Mining Co.,* 339 U.S. 186 (1950); *Wm. G. Roe & Co. v. Armour & Co.,* 414 F.2d 862, 867 (5th Cir. 1969); *Poster Exchange, Inc. v. National Screen Service Corp.,* 362 F.2d 571, 574 (5th Cir. 1966); *Fontainebleau Hotel Corp. v. Crossman,* 286 F.2d 926, 928 (5th Cir. 1961).

IV. The Decisions Of The Fifth Circuit In This Case Correctly Interpret The Substantive Texas Law Regarding Resulting Trusts.

Finally, after stripping Petitioner's Petition of all its excess verbiage, Petitioner once again requests that this Court grant certiorari to review the full evidentiary record and inferences that be drawn and substitute its judgment of the facts for that reflected in the two appellate court decisions. Petitioner is asking this Court to disregard the Fifth Circuit's opinion and to determine if the facts of this case support a resulting trust.

It has historically been held that a resulting or purchase money trust must be created at the time of the transaction in which title to the property was taken in the name of the person charged with being trustee. Actions taken or promises made prior to the transaction or after the transaction are simply not relevant or even admissible to determine whether a resulting trust should be imposed. As stated by the court in *Trinity Fire Ins. Co. v. Solether:*

> To support a claim of resulting trust such as that asserted here, it must appear that the consideration was paid (or assumed) by the claimant and the trust created, at the very time and by reason of the very facts of the transaction itself. . . . In *Parker v. Coop, supra,* this rule, as stated in

> Perry on Trusts, is approved: The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself.[16]

As stated by the court in *Sentry I:*

> A resulting trust is an actual, binding trust that can develop where the parties intended a confidential or fiduciary relationship to develop and acted accordingly, but failed to create a valid actual trust agreement. * * * The resulting trust analysis does not apply to this case, however, because it requires evidence of a shared intent to establish a strict fiduciary relationship. 715 F.2d at 946.

As the Fifth Circuit has held in *two* prior opinions, there remains an insufficient basis for the imposition of a resulting trust.

The Fifth Circuit's holding is further supported by the Texas Supreme Court which has stated:

> The doctrine of resulting trusts is founded in the presumed *intention of the parties;* and, as a general rule, it arises where, and only where, such may be reasonably presumed to be the intention of the parties, as determined from the facts and circumstances existing at the time of the transaction out of which it is sought to be established.[17]

Furthermore, the Texas courts have consistently distinguished, as did the Fifth Circuit in *Sentry I,* between a constructive trust and resulting trust by the fact that a resulting trust carries with it the element of the intention to create a trust, while a constructive trust arises by operation of law without reference to

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[16] *Trinity Fire Ins. Co. v. Solether,* 49 S.W.2d 940, 942 (Tex. Civ. App. — San Antonio, 1932).

[17] *San Antonio Loan & Trust Co. v. Hamilton,* 155 Tex. 52, 283 S.W.2d 19, 28 (Tex. 1955).

intent.[18] The Fifth Circuit simply found that the facts of this case do not support a finding of such an intent.

The cases cited by Petitioner support Respondent's position that no resulting trust existed in this case. As stated in Petitioner's brief, "a resulting trust arises by operation of law when title to real property is conveyed to one person but the purchase price is paid by another,"[19] or when the beneficiary obligated himself to do so under an agreement made prior to or at the time of the conveyance.[20] As also stated by Petitioner, a resulting trust is predicated upon the equitable doctrine of consideration.[21]

The property in question here was purchased in the name of Respondent's predecessor in title, Home Engineering, Inc. $25,500 of the $30,500 purchase price was the *exclusive* obligation of Home Engineering, Inc. pursuant to its Promissory Note to Dyckman. The only payments made to Dyckman on the note were made by *Home* — not Ward. Ward was not *legally* obligated in any way either to Stuart Dyckman or to Home Engineering, Inc. for that sum of money. Indeed, any action by either Dyckman or Home Engineering, Inc. to attempt to compel *Ward* to pay that Note would clearly be subject to failure upon the mere raising of the Statute of Frauds defense, Section 26.01, Texas Business and Commerce Code; and Article 1288 V.R.C.S. To hold otherwise would require a

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[18] *San Antonio Loan & Trust Co. v. Hamilton,* 155 Tex. 52, 283 S.W.2d 19, 28 (Tex. 1955); *Sohio Petroleum Co. v. Junek,* 248 S.W.2d 294, 297 (Tex. Civ. App. — Ft. Worth, 1952, no writ); *Sentry I, supra.* at 946.

[19] Petitioner's Petition for Writ of Certiorari, p. 11.

[20] *Wright v. Wright,* 132 S.W.2d 847 (Tex. 1939); *Bybee v. Bybee,* 644 S.W.2d 218 (Tex. Civ. App. — Ft. Worth 1982); *Knox v. Long,* 251 S.W.2d 911, 917 (Tex. Civ. App. — Texarkana 1952), rev'd on other grounds, 152 Tex. 291, 257 S.W.2d 289 (1953); *Lail v. Hankla,* 276 S.W.2d 340, 346 (Tex. Civ. App. — Eastland 1955); *Stone v. Fitts,* 160 S.W.2d 1013, 1014 (Tex. Civ. App. — Ft. Worth 1942).

[21] *Id.*

judicial determination that the Statute of Frauds in Texas simply does not exist.

In order to establish a purchase money trust, it was necessary that Ward establish three things:

> (1) an agreement between the parties that such a trust shall exist, (2) that the beneficiary (Ward) furnished the money with which the purchase is to be made, or obligated himself to pay *it in a way that the purchaser can enforce it,* and (3) the conveyance was made to the grantee in pursuance of such agreements and obligation. *Stone v. Fitts,* 160 S.W.2d 1013, 1014 (Tex. Civ. App. — Fort Worth 1942) (emphasis added).

Ward has not met that burden. As previously noted, the Texas Statute of Frauds clearly would prevent Dyckman, Whatley or Home Engineering, Inc. from enforcing any "obligation" by Ward to repay the $25,500.00 part of the purchase price. As is said in *Hammett v. McIntire,* 365 S.W.2d 844, 847 (Tex. Civ. App. — Houston 1962):

> If prior to or contemporaneously with the execution of a deed conveying property to one person, another person pays the purchase price or becomes *legally* obligated to do so, and it is agreed that the person to whom the property is conveyed shall hold the title for the use and benefit of the person paying or becoming legally obligated to pay the purchase price, the bare legal title is in the grantee in the deed and equitable title is in the person paying or agreeing to pay the purchase price. (emphasis added)

As noted by the Fifth Circuit in this case, there is no evidence to support a finding of a strict fiduciary relationship between the parties whereby title to the Dyckman tract was to be held by Whatley in trust for Ward. It is significant that the *Stone* court refused to impose a trust in that case on facts strikingly similar to those of the instant case. The court noted that there was no pleading that the appellant had made "an absolute promise to reimburse appellee for the funds so expended." Similarly, there is neither a pleading *nor* proof that

Ward ever entered into a *binding* obligation to repay Appellants for the note Home Engineering executed to Dyckman.

As noted in *Rankin v. Naftalis,* 557 S.W.2d 940, 943-4 (Tex. 1977), one of the most recent Texas Supreme Court cases dealing with implied trusts:

> The Texas Legislature on successive occasions from the early days of the Republic has expressed its intent that contracts concerning lands must not, as Lord Coke expressed it, 'be left to slippery memory' but must be reduced to writing. The purposes served by and the reasons for the Statute of Frauds, Tex. Rev. Civ. Stat. Ann. Art. 7425b-7, are reiterated in *Consolidated Gas & Equipment Co. v. Thompson,* 405 S.W.2d 333 (Tex. 1966), and earlier by *Pope v. Garrett,* 211 S.W.2d 559, 562 (1948). In 1943, the law allowed some margin in the enforcement of express oral trusts; but in 1943 the Texas Trust Act terminated that liberality by the enactment of Article 7425b-7.

V. The Decision Of The Fifth Circuit In No Way Violates The Due Process Clause Of The Fifth And Fourteenth Amendments, The Petitioner's Right To Equal Protection, Or The Rules Of Decision Act.

Petitioner contends that the Fifth Circuit has violated the Due Process Clause of the Fifth and Fourteenth Amendments; the Petitioner's Right to Equal Protection; and the Rules of Decision Act. As Petitioner notes, due process encompasses the right to be heard — i.e., the right to have your theory considered and decided by the Court. If nothing else, he certainly has been heard.

The Fifth Circuit, after defining and distinguishing a resulting trust from a constructive trust in *Sentry I* at p. 946 stated "The resulting trust analysis does not apply to this case . . . ." In *Sentry III,* the Fifth Circuit, *once again,* addressed this very issue and stated:

> While this Court's statement, taken in an isolated fashion, arguably could be construed as dictum, . . . , the Court's

opinion must be read as a whole. This Court *obviously* was well aware that the theory of resulting trust was an alternative theory on which Ward might possibly have recovered in the district court. In any event, *since this Court had previously considered the alternative theory of resulting trust and rejected it, the Court specifically directed that judgment be entered in favor of Sentry Title* .... *Sentry III* at 1280.

The Fifth Circuit further stated in its footnote:

It is common practice for this Court to consider theories other than that relied upon by the district court in order to consider whether the judgment of the district court may be affirmed on an alternative ground. Often the Court will ask the parties to submit supplemental briefs to assist the Court in this effort. *Here, the Court on the prior appeal addressed an issue which required no further fact finding by the district court and which had been briefed by the parties in trial briefs included in the record. Such action promotes the finality of litigation, consistent with the goal that "the federal system aims at a single judgment and a single appeal."* 1B Moore's Federal Practice paragraph 0.404[10], at 169 (1984). Similarly, this Court often addresses issues for the guidance of the parties and the district court on remand. It cannot be said that such considered statements should be dismissed as dictum simply because the Court was not absolutely required to raise and address such an issue. *Such statements constitute the "professed deliberate determinations of the [court]" and, when done in this fashion, may not be summarily dismissed as dictum. See,* Black's Law Dictionary 409 (5th ed. 1979). *Sentry III* at 1280. (emphasis added)

This language clearly established the full adjudication of the resulting trust issue. The concept of due process — while insuring the right to be heard — does not insure the litigant he will be pleased with the decision. And, of course, Ward is *not* pleased with the result. But in most cases, half of all litigants *will not* be satisfied with the result. Someone has to lose. The mere fact that one has lost a case does not mean he has been

denied due process or that there is a lack of fundamental fairness.

The court in *Sentry III found* "no grounds or manifest injustice" requiring a reexamination of the court's prior opinion. *Sentry III,* at 1282. This finding is consonant with the *Sentry I* panel's holding that their award in favor of Whatley *would not result in unjust enrichment to Whatley. Sentry I,* at 949. Petitioner's due process and equal protection rights and the Rules of Decision Act were simply not violated.

VI. Petitioner, Having Exhausted All Reasonable Remedies, Is Now Pursuing Frivolous Remedies In An Attempt To Thwart The Results Of His Unsuccessful Appeals.

If there is any serious due process and equal protection issues in this case, it is the Respondents' right to have this litigation brought to an end. While recognizing that all litigants are entitled to due process, Respondent would respectfully submit that no litigant is entitled to abuse that process to the detriment of his adversaries or the courts. A brief history of the instant litigation would show that Petitioner Travis Ward has engaged in such abuse.

This case was filed in 1975 — 12 long years ago — and relates to transactions which occurred in 1970. After languishing in federal district court, for a variety of reasons, from 1975 until late 1980, the district court finally entered an order in early 1981 that the case be brought to trial in April 1981.

Trial consumed approximately one week. In November 1981, the district court entered its findings of fact and conclusions of law. That resulted in a judgment being entered in January 1982. That judgment sustained Petitioner's claim only on a constructive trust theory and denied all other relief. Respondents appealed the decision. Almost four years ago, in September 1983, the Fifth Circuit reversed the district court's decision, and rendered judgment in favor of Respondents.

Since the inception of this case, Ward has been represented by no less than six different attorneys and firms. Ward was initially represented in the state and federal court litigation by the firm of Strasburger & Price of Dallas, Texas, one of the largest firms in the city. Rohde, Chapman, Ford & Howe tried the case and handled the initial appeal to the Fifth Circuit. Rohde, Chapman was followed by Professor William Dorsaneo. When that proved to be unsuccessful, Professor Dorsaneo was followed by Professor Page Keaton, former Dean at the University of Texas School of Law, of the firm of Scott, Douglas & Keaton, who handled Petitioner's motion for recall of mandate. When that did not result in a favorable decision, Petitioner then hired the firm of Hiram C. Eastland, Jr. of Jackson, Mississippi, who filed Ward's second motion for *en banc* rehearing. When that did not succeed Ward then hired James C. Coleman, retired Chief Judge of the United States Fifth Circuit, to assist in obtaining another rehearing of the matter and who is also listed as counsel in this proceeding.

At the time Ward withdrew the funds on deposit with the Clerk of the Court, in February 1982, he received the sum of approximately $400,000. While it is impossible to estimate the total sum which Mr. Ward has spent on attorneys' fees in the course of this case, one may safely presume that they have probably consumed the substantial portion of the funds which Mr. Ward has received. Mr. Ward's actions have now gone beyond a mere attempt to obtain due process and constitute an abuse of process.

It is interesting to note that though Ward has filed *four* suggestions for *en banc* rehearings, every one has been denied without a single member of the Fifth Circuit even requesting a poll of the court.

Not counting his supplemental briefs, Petitioner has filed no less than *ten* briefs in the Fifth Circuit in this case — three principal briefs prior to each published decision, three Motions for Rehearings and four Motions for Rehearings En Banc. Mr.

Ward's right to due process should not be allowed to infringe upon Respondents' correlative and equally important right to due process, which includes the right that all litigation should ultimately be brought to an end. Twelve years is long enough. This is not a complicated action. It involves relatively straight forward legal issues and there are dozens of cases in which the course has been charted over the years. The Fifth Circuit had ample opportunity to consider and has properly decided the issues presented. However, even if by some chance the Fifth Circuit were wrong, that is not a basis for this litigation to be allowed to continue indefinitely. All cases must ultimately come to a conclusion and it is well past time that this one be brought to that conclusion.

The petitioner does not raise any issues which were not previously raised in this Court. There are no new cases to be considered. Petitioner's actions are designed simply to gain time. They are kinds of actions which this Court has explicitly stated it will not tolerate. Sup. Ct. Rule 492 provides that this Court may award Respondents damages when it appears that the petition is "frivolous." That rule is predicated on the power granted in 28 U.S.C. 1912. In referring to the predecessor of this section, the Court has said:

> This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say that this power will be exercised without hestitation in all cases where we find out our jurisdiction has been invoked merely to gain time. *Amory v. Amory,* 1 Otto 356, 357 (1875), 91 U.S. 356, 23 L.Ed. 436.

The actions of Petitioner's many attorneys reflect an intention to delay this case and turn it into one which never ends. It would be indeed difficult to find a case in which it would be more appropriate to apply the Second Circuit's admonition that "We will not countenance attempts to pervert the federal judicial process in a Dickensian Court where lawsuits never end." *Overmyer v. Fidelity and Deposit Co. of*

Maryland, 554 F.2d 539, 543 (1977). Respondents believe that this case presents one of those rare instances in which an award of damages would be appropriate.

VII. Conclusion

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition and award Respondents damages due to Petitioner's vexatious and dilatory tactics.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 1987, I served copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari on the party hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to Hiram C. Eastland, Jr., Esq., Eastland Law Offices, 600 E. Amite Street, Jackson, Mississippi 39202, Counsel of Record.

I further certify that all parties required to be served have been served.

_____

J. Albert Kroemer